No. 40

In the Supreme Court of the United States

October Term, 1961

DAVID D. BECK,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

PETITIONER'S BRIEF

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES S. BURDELL
929 Logan Building
Seattle 1, Washington

JOHN J. KEOUGH
1804 Washington Bldg.
Seattle 4, Washington
Counsel for Petitioner

FRAYN PRINTING COMPANY, SEATTLE

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1904 Washington Bldg.
Seattle 4, Washington

Counsel for Petitioner

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Some of the citations of authorities appearing in the body of this brief were discovered to be inaccurate during printing. While time would not permit a reprinting of each page wherein such errors occur, the citations as they appear in the Table of Cases have been corrected and are accurate.

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I

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (en banc) was filed on February 3, 1960, and is reported at 56 Wn. 2d 474, 349 P. 2d 387. The opinion is included in the record at pp. 828-896.[1] The Supreme Court of the State of Washington thereafter granted a petition for rehearing (R. 902), upon rehearing remained "equally divided on the merits", and denied the petition 56 Wn. 2nd 537 (R. 904) and thereafter denied a second petition for rehearing (R. 907).

1. This opinion is a statement of four judges of reasons for affirming the judgment and sentence of the trial court (R.27) and of four judges in favor of remanding the appeal with directions to dismiss the indictment.

II

JURISDICTION

The final judgment of the Supreme Court of the State of Washington was entered on August 22, 1960[2] (R. 907). In accordance with Rule 23, an order was entered here extending the time for filing the Petition for Writ of Certiorari to and including January 19, 1961 (R. 911). Following the filing of the petition within the time limited by the order, the petition was granted by order of April 3, 1961, limited to certain questions raised by the petition (R. 911).

Jurisdiction of this Court is invoked upon the timely filing of and order granting the Petition for Writ of Certiorari, 62 Stat. 929, 28 U.S.C. 1257 (3), and the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States.

III

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, §1, of the Constitution of the United States provides in part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10.28.030 of the Revised Code of Washington provides that a grand juror may be challenged:

". . . when, in the opinion of the court, a state

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[2]. This order denied a petition for rehearing. Under local rules filing of a petition for rehearing stays any prior decisions.

of mind exists in the juror, such as would render him unable to act impartially and without prejudice."

Article IV, §16 of the Washington State Constitution provides:

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Section 10.28.070 of the Revised Code of Washington provides:

"The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask."

Section 10.40.070 of the Revised Code of Washington provides:

"The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained . . . (4) that the grand jury were not selected, drawn, summoned, impanelled, or sworn as prescribed by law . . ."

Article I §22 (Amendment 10) of the Washington State Constitution provides:

"In criminal prosecutions the accused shall have . . . the right to appeal all cases;"

Article IV, §2 of the Washington State Constitution provides:

"The Supreme Court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision . . . In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the Supreme Court from time to time and may provide for separate departments of said court."

R.C.W. 2.04.070 provides:

"The Supreme Court, from and after February 26, 1909, shall consist of nine judges."

Rule 6 of Rules Peculiar to the Business of the Supreme Court provides:

"The court is divided into two departments, denominated respectively, Department One and Department Two . . .

* * *

"The presence of four judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of four judges shall be necessary to pronounce a decision in each department."

R.C.W. 2.04.170 provides as follows:

"The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court *en banc*: Provided that if five of the judges so present do not concur in a devision, then reargument shall be ordered and all judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court *en banc* shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court *en banc* shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such a period shall have

the effect of suspending the decision until disposed of by the concurrence of five judges; . . ."

Rule 15 of the Rules Peculiar to the Business of the Supreme Court provides:

"The Chief Justice, or any four judges, may convene court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision of the court *en banc*: Provided, that if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: . . . ."

Section 10.25.070 of the Revised Code of Washington provides as follows:

"The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to the excitement or prejudice against the defendant in the county or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence, nor in any case unless the judge is satisfied

the ground upon which the application is made does exist."

Section 4.04.010 of the Revised Code of Washington provides:

> *"Extent to which common law prevails.* The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the State of Washington nor incompatible with the institutions and conditions of society of this state, shall be the rule of decision in all the courts of this state." [1891 C17 §1; Code 1881 §1; 1887 p. 3 §1; 1862 p. 83 §1; RRS §143]

IV

QUESTIONS PRESENTED

(1) Where petitioner individually and the labor union, of which he was president, were subjected to continuous, extensive and adverse publicity in all media of communication throughout the city and judicial district prior to calling of a grand jury to investigate charges made in such publicity, did petitioner have a right under the Fourteenth Amendment:

a. to have the grand jurors selected and impanelled in a manner which would prevent or minimize selection of biased and prejudiced grand jurors;

b. to have such grand jury charged and instructed to act fairly and impartially and only upon the evidence presented to it.

(2) Where petitioner and the union of which he was president were subjected to continuous and inflammatory public charges in all news media of the community in which he lived prior to and throughout the deliberations of a grand jury called

in that community, was it a denial of petitioner's rights under the Fourteenth Amendment:

a. For the Court having charge of the grand jury (1) to mention petitioner by name and in his capacity as president of the union to the grand jurors, (2) to refer to "recent testimony before a Senate Investigating Committee" disclosing that officers of the Union "had, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members", (3) to advise the grand jury that petitioner claimed money he had received was a loan but this was a question of fact for the jury, (4) and to inform the grand jury that "The necessary criminal charges can only be brought in this county";

b. For the state's prosecutors in the secrecy of the grand jury room (1) to threaten witnesses testifying contrary to the beliefs of the prosecutor with prosecution for perjury, (2) to state personal disbelief in such testimony, and (3) to present as "facts" to the grand jurors personal belief of the prosecutors.

(3) Was petitioner deprived of his rights under the Fourteenth Amendment to accusation by a fair and impartial grand jury by the facts and circumstances prior to and at the impanellment of the grand jury and throughout its deliberations.

(4) Where petitioner and the union of which he was president were subjected to particularly intensive and hostile public comment in newspapers, magazines, radio, television and all other forms of communication at the place of trial for nine months

immediately preceding the date of his trial, was petitioner's right to a fair trial under the Fourteenth Amendment denied:

a. Where timely motions for continuance were denied; and

b. Where timely application for a change of venue was denied.

V

STATEMENT OF THE CASE

A. Pre-Grand Jury

On February 26, 1957, The Select Committee on Improper Activities in the Labor or Management Field (commonly known as the "McClellan Committee", or the "Senate Rackets Investigating Committee") commenced an investigation of certain labor unions and their officials.

By March 3, 1957, newspapers reported the Committee Chairman's comments that the Committee had "produced 'rather conclusive' evidence of a tie-up between West Coast Teamsters and underworld bosses to monopolize vice." The same report said that "Teamsters' President Dave Beck and Brewster will be summoned for questioning on a charge that they schemed to control Oregon's law enforcement from a local level on up to the governor's chair." (R.509).

By March 22, 1957, articles by local newspaper reporters said:

> "The committee said * * * * that $250,000 had been taken from Teamster's funds * * * * and used for Beck's personal benefit" R.513)

On March 26, 1957, petitioner was called before the Committee and Seattle newspapers reported in front page headlines (R.517) *"Beck Takes 5th*

Amendment, President of Teamster's 'Very Definitely' Thinks Records Might Incriminate Him".[3]

By March 27, 1957, a Seattle Television station advertised exclusive "live" television of Dave Beck at the hearings. About 9¾ hours of the day's broadcast were devoted to the hearings. A news report stated that radio broadcasts of the previous day of petitioner's appearance before the Committee had brought an "astounding response" and that the station's telephone switchboard "was swamped with thousands of calls, more than for any other broadcast." (R.516).

Local interest was so acute that films of the hearings were made and flown immediately to the Seattle-Tacoma area for telecast at length and at peak viewing hours (R. 503-504).

By April 12, 1957, U.S. News & World Report captioned an article:

> "Take a look around Seattle these days and you find what a Senate inquiry can do to a top labor leader in his own home town." (R.531)[4]

On May 3, 1957, petitioner was indicted in the neighboring city of Tacoma for alleged income tax evasion, a fact announced in block headlines in local

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[3] Petitioner had, of course, claimed protection of the 5th Amendment upon advice of counsel. (R.504)

[4] As four of the judges below pointed out:
"Because appellant was then, and since childhood had been, a resident of Seattle, and for the preceding thirty years had been a labor leader of national reputation, this area was the focal point for the dissemination of the highly derogatory publicity concerning appellant which resulted from the Committee hearings. The local press featured front-page headlines in large, heavy type, in which the more sensational excerpts from that day's testimony or other proceedings of the Committee were flamboyantly displayed." (R. 864-5.)

newspapers with front page headlines (R. 534) simultaneously announcing the appointment of former Seattle Mayor Devin as Chief Special Prosecutor before the grand jury (R. 535) which had been called *"to investigate possible misuse* of Teamster's Union funds by international president Dave Beck." (R. 536).

Petitioner was called as a witness before the Senate Committee on May 8, 1957. His attorney, previous to any interrogation, pointed out that there was a pending tax indictment against the defendant and asked that the witness be excused until disposition of the tax case (R. 650-651). The Committee was advised by petitioner's attorney that he would necessarily advise the witness to claim the protection of the Fifth Amendment if he were questioned.

Reporting from Washington, a staff reporter for the Seattle Times said Committee Counsel was directed to read the "52 accusations of misuse of authority, position and trust" to the witness and "gave Beck a chance to comment about them — point by point." (R. 555). Petitioner, of course, claimed the protection of the Fifth Amendment as his attorney advised him and as the Committee had been informed.

The torrent of headlines continued unabated for the next few weeks, the Committee reports being augmented by publicity concerning the tax evasion indictments and the pending grand jury:

> "Senate Probe Lifts Lid on Beck Beer Business Use of Union Money Related" (R. 537)
>
> "Beck Profit from Trust Fund of Widow Told" (R.540)
>
> "'Greed and Avarice' Assailed by Prober" (R.541

"Mail Fraud Possible in Deal, Says Solon" (R.541)

"BECK APPARENTLY STOLE $300,000 FROM UNION, SAYS PROBE AID" (R. 544, 545)

"BECK MISUSED UNION POSITIONS IN 52 INSTANCES, SAY PROBERS" (R. 552)

"Senate Document Charges Beck 'Took' $300,000.00" (R.557)

"McClellan Blasts Beck for 'Rascality' 5th Involved Sixty Times" (R.558)

" 'Beckadillos' Blasted As Incredible By Bishop Bayne" (R.650)

"Beck Actions Hit By Bishop Bayne" (R.561)

"Beck Ousted from A.F.L.-C.I.O. Post—Teamster Chief Found Guilty of 'Violating Trust'." (R.563)

These headlines were from the two largest newspapers in King County. They are illustrative only. In fact "there were thousands of additional and similar reports published in the Seattle Post-Intelligencer, the Seattle Times, and in other daily newspapers published in or circulated throughout the State of Washington" (R. 502). There was also, of course, massive radio and television coverage (not reproducible, of course, in the record) leaving at least as great an impact. Such publicity was so prevalent, particularly in King County, that it is referred to as "saturation" coverage—"news coverage designed by one or another media of news transmission to reach the maximum proportion of persons in a given community" (R. 503). Out of the thousands of articles hostile to petitioner, his attorneys

found none "which suggest that opinion be reserved pending trial." (R.502)[5].

On May 20, 1957, the very day the grand jury convened, Senator McClellan was reported to have "bluntly rejected an assertion by the Americal Civil Liberties Union that Senate Investigators have infringed Dave Beck's rights, specifically by McClellan using the word "theft" in relation to Beck's handling of Teamster Union funds. Senator McClellan was quoted as saying:

> "May I say that the committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses." (R. 656).

B. *Grand Jury Impanellment*

At 9:30 a.m. on May 20, 1957 those summoned for grand jury duty appeared in the Superior Court for King County. The Court advised those assembled of the technical qualifications of jurors, i.e. an elector and taxpayer of the State, resident of the county for one year, over 21 years old, of sound mind and literate (R. 312). An undisclosed number of jurors were excused during proceedings

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[5] Four of the judges below characterized the news barrage as follows:

> "These comments, which were extremely derogatory to appellant, were widely circulated by all news media throughout the United States and particularly in the Seattle area. In these comments, appellant was characterized as a thief, and it was asserted that he was guilty of fraud and other illegal conduct with respect to his management of the affairs of the Teamsters Union as its principal officer in the eleven western states, and later in his position as its international president (R. 866).
>
> • • • •
>
> "The amount, intensity and derogatory nature of the publicity received by appellant during this period is without precedent in the State of Washington." (R. 867).

which took place off the record. Seventeen jurors were called and individual interrogation of the jurors by the Court commenced (R. 313).

No questions were asked as to whether or not any member or the panel as a whole had read, seen or heard publicity or had any bias or prejudice against unions in general, any teamsters union or any official of any union. In general, each prospective grand juror was asked if he had ever been a member of any Teamster Union, knew any officer of a Teamsters Union or had ever been an officer in any union. Questioning was then usually concluded by the Court's inquiry:

> "Is there anything about service on this grand jury that might embarrass you?"

One prospective juror volunteered:

> "I am prejudiced *to this particular case* after reading the newspapers and watching television and comment." (R.317) (emphasis supplied) [*].

A second prospective juror said:

> "I am awful prejudiced on the case is all I can say. I followed it from . . ." (R.319).

Upon completion of the interrogation, the two witnesses who had volunteered prejudice were excused (Moreau, R. 317-322, and Mabe (R. 319, 322), together with the only grand juror then a member of a Teamsters local union (Johnson R.318, 322). In addition, the only juror who was asked if he was "conscious of any bias, prejudice or sympathy in this case at all" and who replied that he, if required

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[*] This comment indicates the knowledge of all present that the grand jury was to investigate petitioner in the light of the existing publicity. At this point, so far as the record shows, there had been no mention of petitioner by name or particular office.

to sit, "could do so analyzing the evidence and doing what is right and fair" (R.320) was also excused (Mr. Eyman, R. 322). One other juror, then engaged as assistant secretary of the Washington State Senate, was also excused (Hagan, R. 321, 322).

Five more jurors were called to replace those excused.[1] One was excused without further questioning (R. 325). The twenty-third grand juror, who was to become the foreman, was seated after perfunctory questioning, and the seventeen members seated in the jury box were sworn (R.326).

No juror was interrogated as to any state of mind or opinion which would or might tend to make him unable to act impartially and without prejudice toward petitioner or other officers of the Teamster's Union, although the court asked one prospective grand juror whether he was acquainted with Mr. Brewster or Mr. Beck (R. 324), and made reference to "officers of the Teamsters Union" in his charge (R. 329).

C. *Charge to the Grand Jury*

Immediately after the grand jury was sworn, the court addressed them as follows:

> "Members of the grand jury. What are the duties of the grand jury? Why has it been called? How does it operate? . . ."

Answering these questions for the jurors, the court continued (in part):

> "The institution of the grand jury comes to

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1. At least two of these had talked to the court some short time previously in a fashion not disclosed by the record, i.e. Raynor: "I talked to you a few minutes ago." (R. 323) and Johnson: "We have talked to you several times . . . . We know all about your business and everything." (R. 323).

us from the common law of England where *the grand jury's original function,* curiously enough, was to stand as a buffer between the King of England and the citizens. It's purpose was to prevent unjust prosecution by the Crown. . . [8]

". . . its use has been greatly limited in recent years, and in many states, like our own, it has been used so seldom that most people, even attorneys, are unfamiliar with its underlying purpose." (R. 327.)[9]

After instructing the grand jurors as to its subpoena powers, assistance from prosecutors, secrecy of proceedings and statutory powers and duties[10] the court said:

"We come now to the purpose of this grand jury and the reasons which the judges of this court thought sufficient to justify the expense to the county, and the inconvenience to and sacrifice by you, which this grand jury session will require.

"It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members. It has been alleged that many of

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[8] Four judges below "disagree completely . . . as to the function of a grand jury in this case" (R. 829) but did not attempt to disagree with this obvious historical truth of the common law and its applicability to Washington law as it existed at the time of statehood.

[9] There have been only eight grand jury sessions in King County since 1917, including the one that indicted petitioner. (R. 381, n. 7).

[10] The court said these powers "should be exercised sparingly or not at all." (R. 329).

these transactions, through which the money was siphoned out of the union treasury, occurred in King County. Such crimes, if committed, cannot be punished under Federal Law, or under any law other than that of the State of Washington, and prosecution must take place in King County. The necessary criminal charges can only be brought in this county upon indictment by the grand jury or information filed by the prosecuting attorney.

"The president of the Teamsters Union has publicly declared that the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain."

* * *

"To completely investigate all of these items may be beyond the energy and endurance of yourselves, the prosecutors and investigating staff. The financial burden of such a complete investigation may be beyond the resources of King County. I urge you to do all that you can within practical limitations to ascertain the truth or falsity of these charges." (R. 329-330).

* * *

"You have a most serious task to perform and know you realize it is being performed, and is to be performed by a grand jury picked at random from among the citizens in this community, and thus we hope to keep the law close to the people. It is a tremendous responsibility, and I wish you well in your work." (R. 331).

No admonition was given to the grand jurors to base their deliberations solely upon evidence presented to them. No warning was given to the grand jurors that radio, television and newspaper reports were not evidence, that no inference of guilt should be drawn against one who invokes the Fifth Amendment privilege, and that their functions and de-

liberations should be free of any bias or prejudice. The words used were to the opposite effect. The "purpose" of the grand jury, justifying "expense to the county" and "inconvenience and sacrifice" by the jurors was to consider "testimony before a Senate Investigating Committee" that petitioner had "embezzled or stolen hundreds of thousands of dollars."

The jurors were told that "many of these transactions, through which the money was siphoned out of the Union treasury, occurred in King County." Finally, the jury was told that these crimes were not punishable "under any law other than that of the State of Washington, and prosecution must take place in King County. "The necessary criminal charges can only be brought in this county . . ."

The grand jurors returned to their homes, television, radios, newspapers, friends, neighbors and business associates for "two or three weeks" (R. 331) while the prosecutor's staff prepared subpoenas and made investigation.

D. *Hostile Publicity During Grand Jury Session.*

From the time the jury was sworn to the date of his indictment, petitioner remained the center of an unabating maelstrom of charges.

By way of illustration from some of the exhibits in the record (which are in turn only a small portion of the total number of publications and references), the following occurred:

McClellan Lays
'Many Criminal'
Acts to Beck
(May 1, 1957, R. 568)

THE CASE AGAINST DAVE BECK
AS SENATORS SEE IT
(May 24, 1957, R. 569)

Reflecting against the particular focus and impact of the publicity, TIME Magazine on May 27, 1957 published an article under the heading

A CITY ASHAMED
Dave Beck Is on Seattle's Conscience
(R. 573)

$30,000 Reported Paid McEvoy;
Witnesses Take 'Fifth' 221 Times
(R. 577)

...

"Beck, Jr., who even refused to say whether he knew his father, took shelter behind the amendment 130 times, following the example of Beck, Sr. who refused to answer 210 times in three appearances before the committee. (June 11, 1957, R. 577).

BECK JR. TAKES 5TH 130 TIMES
SR. ARRAIGNED IN TAX CASE
(June 5, 1957, R. 580)

The proceedings of the grand jury were extensively reported along with the denial by the Federal District Court Judge having jurisdiction of the tax evasion indictment, of petitioner's application to leave the judicial District, and statements of the King County Prosecuting Attorney praising the efforts of the special prosecutors (R. 656-658).

E. *Misconduct of the Prosecutors in the Grand Jury*

On June 20, 1957, Fred Vereschueren, Jr. was called as a witness by the grand jury (R. 349). He was interrogated first by Mayor Devin (R. 349)

then by Mr. Regal (R. 361), then by Mr. Lawrence (R. 365) and further cross-examined by each (R. 368, 370, 372, 373, 375). He was called on July 10, 1957 (R. 378). He was examined and repeatedly cross-examined by Messrs. Devin (R. 378, 386, 476), Regal (R. 396, 433, 454, 462, 474, 479) and Carrol (R. 412-413, 452, 453, 457, 467, 479).

Petitioner's attorneys were informed and the newspapers reported that "a considerable amount of pounding on the table and loud voices" were heard outside of the grand jury room (R. 490).

Accordingly, upon motion of the defendant the testimony of this witness was transcribed. The court, however, refused to permit defendants to obtain the transcript prior to trial but ordered it sealed and to be available to defendant only upon conviction and appeal (R. 18).[11]

The Court said his perusal of the testimony indicated that such intemperate statements did not appear to have resulted in the witness changing his testimony to the prejudice of the defendant. By way of an "extreme example" the court explained:

> "Suppose a witness before a Grand Jury was tortured physically and as a result of that physical torture he gave false testimony which resulted in an indictment. Then I say that a defendant would have, or probably a right to have that indictment set aside, if that testimony was false. Suppose, however, that after such physical torture the witness never changed any of his testimony in any degree. Now, of course, he would have his remedy

[11] The court had read "this testimony through and find in the testimony numerous references by one or more of the prosecuting officials to the statute on perjury, to a statement of claimed disbelief of the statements or testimony made by one of (sic) the other of these witnesses." (R. 675).

against the prosecuting officials in either a criminal or civil action but how has the defendant's rights been affected." (R. 675).

The transcript of this witness' testimony shows (among many other instances) the following threats and testimony by prosecutors:

"Q. Mr. Verschueren, I want to warn you at this time that you are under oath and that what you say here, if found to be false, can be perjury for testifying falsely under oath.
A. Yes sir.
Q. You are under oath.
A. Yes sir.
Q. And the penalty for perjury is fifteen years in the penitentiary, it is a felony.
A. Yes sir.
Q. Now, I want to give you every opportunity to state the truth.
A. Yes sir.
Q. You appear to have already changed your testimony from what it was a few moments ago.
. . .
A. No sir. (R.389)

-o-

"Q. I want you to tell the truth.
A. I am telling the truth.
Q. There is no reason for you to go to the penitentiary for somebody else.
A. I am not even thinking about that, sir.
Q. Well, I am thinking about that, sir." (R.401)

-o-

"Q. When I get through with you Mr. Regal is going to take over again. We don't think you are telling the truth." (R. 420).

-o-

"Q. Then you . . . concoct this fallacious story." (R. 436).

"Q. . . . No person in this room believes you . . . you are standing very close to a perjury charge, if not aiding and abetting grand larceny." (R. 436-437).

-o-

"Q. You can't get a $500 bill from a teller because they don't keep them there." (R. 462)

Q. Did you know they don't keep $500 bills at all behind those windows . . . Did you know that?
A. No sir, I did not.
Q. You know it now.
A. No, I don't.
Q. I am telling you now. They don't keep them there. You can't get a $500 bill without making a request for it. . .
A. No, I did not know that.
Q. We are going to assume, just for the value of this discussion then, that is correct because I know it to be correct." (R. 462)[12]

F. Post Indictment and Pre-Trial Publicity.

The indictment of the King County Grand Jury was of course, the subject of banner headlines in all local newspapers (R. 590) with comments by the prosecutor of evidence he intended to present at the trial (R. 591) and praise from counsel for the Senate Committee (R. 593).

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[12] The Appendix to the opinion of four judges below excerpts many more instances of prejudical conduct from this testimony (R. 887-895). These judges felt it probable that "his testimony was disbelieved by the grand jury solely as a result of the conduct of the prosecution officers." (R. 881). The remaining four judges did not argue or discuss the point beyond saying:

"The conclusion must be that the examination of witnesses before a grand jury has never been intended to be a matter of judicial control . . ." (R. 837).

The Committee continued to produce headlines:

Probe Told
Beck OK'd
'Phony' Units
(R. 603)

National magazines published comments on the hearings.

> Can Labor Live Down Dave Beck. (SATURDAY EVENING POST, R. 605)

On August 28, 1957, a federal grand jury indicted petitioner and others for additional alleged income tax evasion counts. Papers headlined the news.

Grand Jurors Unanimous on Indictments (R. 609, see also R. 631, 632, 633).

In September a member of the Senate Committee who "came to the Northwest to get away from phones and television" was interviewed in Seattle. He was quoted as saying:

> "The Beck . . . phases of the hearings are all wrapped up and in the hands of the courts." (R. 615).

Alas, on October 10, 1957, the Chairman of the Senate Committee was quoted as saying

> "We have found several instances where Mr. Dave Beck, the international president, instructed the credentials committee to disregard the Teamsters' constitution.
>
> "Without this dictatorial action on the part of Mr. Beck, Mr. Hoffa, the candidate of his choosing, could not have been elected president of the Teamsters." (R. 682, 683).

And on October 29, 1957, the committee produced a small headline over $78.75

Beck's Way to
Tobin Funeral
Paid by Sears
(R. 697, 700)

The Committee's interrogation on November 1, 1957, led to such headlines as:

Former N. Y. Labor
Official Says He
Was Paid by Beck
(R. 706, see R. 705, 707)

On November 5, 1957, alleged co-conspirators in the federal tax indictments were called before the committee. The relationship of these witnesses to petitioner was duly noted under such banner headlines as

Shefferman and Son
Invoke Fifth 56 Times
(R. 709)
-o-
Shefferman Won't Tell
Racket Probe If He Lied
Dave Beck's
Confidante
Testifies
2 Union Aids
Also Silent
(R. 710)

On November 12, 1957, the trial of Dave Beck, Jr. commenced, accompanied by pictures, daily newspaper headlines, television and all of the other accoutrements of a public spectacle.[13]

The selection of the jurors for the Dave Beck, Jr. trial was reported extensively, including the questions asked of prospective jurors and the answers which would be disqualifying (R. 769, 750, 751, 762).

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[13] The prosecutors suggested that the judge first assigned the case should disqualify himself and filed an affidavit of prejudice against the second judge assigned to the trial. Such an affidavit disqualifies the judge under local practice. R. 746, 748). Petitioner's son, however, was charged with this delay in the local newspapers.

There were also extensive news reports of those portions of the Dave Beck, Jr. trial deemed most newsworthy by representatives of the press. The papers reported the prosecutor's charge that Fred Verschuren, Jr. and another "were avoiding subpoenas" (R. 758). The prosecutor did not call him as a witness when he appeared at the next day of the trial, but "told newsmen he did not call Verschueren as a witness because he could not vouch for Verscheuren's testimony" (R. 761, 764). When called as a witness by the defense Verschueren was charged by the prosecutor during cross-examination with having "concocted" his testimony. Newspapers of that day inadvertently lend professional judgment to support petitioner's views of the inflammatory nature of the same charge previously made in the secrecy of the grand jury room. Four column banner headlines proclaimed:

WITNESS DENIES "CONCOCTING STORY" FOR DEFENSE OF BECK, JR.
(R. 768)

Petitioner's own testimony at the trial, disputes over production of grand jury transcripts, and arguments of counsel all were reported in the press (R. 778-785) and on television and radio throughout the trial of petitioner's son.

Announcement of the guilty verdict of Dave Beck, Jr. at 9:33 p.m., November 23, 1957, was the banner news in the following Sunday morning headlines of both papers (R. 791, 792.)[14]

The trial of petitioner commenced on December 2, 1957 (R. 30).

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[14] Although not part of this record, the court deferred sentence of Dave Beck, Jr. upon condition that he abstain from any union employment or activities and the charge against him has since been dismissed.

C. Impanelment of Trial Jurors.

After a brief interrogation of the twelve jurors first seated in the jury box which revealed that all of the jurors had heard of the case and heard opinions as to the guilt or innocence of petitioner (R. 51), the Court said:

> "Now intelligent persons know that impressions they have received from what they have read in the newspapers or heard on the radio, or seen, read or heard on the TV, *are not always true. No intelligent person would rest a decision upon such an impression without a more formal and more convincing type of proof.* Now with those factors in mind, as reference to this subject, I wish to ask you this question. I wish you to search your hearts and minds for the answer. (emphasis supplied)
>
> "Now if any of you from what you have read do feel that you have in your mind . . . such an opinion as would require evidence to remove by either side, please hold up your hands." (R. 53, repeated in substance at R. 181, 183, 267).

Despite the express invitation to acknowledge their own intelligence, at least 19 jurors expressed varying degrees of prejudice against petitioner.

Some typical statements of prospective jurors were:

"I truthfully don't believe I can be unprejudiced in the case." (R. 61)

". . . there has been a great deal of publicity on this particular case and on the Teamsters in general . . . and truthfully, sir, I would myself not wish to be in the position of a juror where a person who has been exposed to as much comment as I have, would be." (R. 187)

" . . . there has been a lot of adverse publicity and I don't know, of course I haven't actually formed a sure opinion as to whether or not

funds have been misappropriated. . . . But there has been a lot of evidence brought out to indicate such could have been the case." (R. 195)

"I may have a bias in the back of my mind." (R. 198)

"I am afraid I am biased." (R.200)

"I don't believe I could be impartial, that is, serve with impartiality." (R. 216)

"I have a preconceived impression or opinion. I don't believe I could be impartial." R. 216. [15]

All of the prospective jurors, including those ultimately selected to try the case had read about the defendant in the newspapers or had seen the televised proceedings of petitioner's appearance before the Senate Committee or both.

It took from the morning of December 2, 1957 through the afternoon of December 4, 1957, to find 12 jurors out of 58 examined who were willing to serve and expressly disclaimed conscious or unconscious bias against petitioner.[16]

H. Motions for Continuance and Change of Venue.

Petitioner made four motions for continuance based upon the publicity and prejudice existing at the time, supported in each instance by affidavits or testimony. The dates, time requested, evidence or affidavits in opposition and disposition of each of the motions may be most concisely shown in tabular form:

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[15] An illuminating and humorous incident occurred when a prospective female juror did not appear to comprehend the court's inquiry as to her state of mind and ability to try the case impartially, but stated: "I have seen him on TV and I wanted to shake him or something, but I wouldn't know." (R. 298). The court excused her on its own motion.

[16] Petitioner, of course, exhausted his peremptory challenges.

Date of Motion	*Continuance Requested*	*Evidence in Opposition*	*Disposition*
Oct. 2, 1957 (R.4)	(1) not earlier than May 1, 1958 or	None	Denied
	(2) date court determines defendant might receive a fair trial	None	Denied
	(3) Sufficient to afford counsel time to prepare a defense	None	5 weeks granted (R. 8)
Nov. 7, 1957 (R.19-21)	One month or sufficient to allow prejudice and hostility to subside	None	Denied Nov. 8, 1957 (R. 22)
Nov.26,1957 (R. 22)	To Jan. 6, 1958 (R. 725, 729)	None	Denied Nov. 29, 1957 (R. 26)
Dec. 2, 1957 (R. 30, 36)	Until the swearing in of a new jury panel in 37 days	None	Denied Dec. 2, 1957 (R. 40)
	Motions for Change of Venue		
Oct. 3, 1957 (R.5)	Whatcom or Snohomish Counties	None	Denied Oct. 11, 1957 (R.9)

The state never filed any affidavits controverting any fact or conclusion relating to the publication, broadcast or telecast of adverse publicity relating to the petitioner;" never asserted in argument or

[17]. Petitioner's attorney averred under oath that of approximately 50 practicing attorneys he had consulted, without exception "all of said attorneys have stated in their opinion it would be impossible for either of the defendants [petitioner and his son] to be accorded a fair and impartial trial in this jurisdiction." (R. 504) The prosecutors did not even express their own opinion to the contrary on this ultimate fact.

otherwise that such publicity was not extremely prejudicial to appellant; never claimed that a delay in the time of trial or transfer to another county would result in added expense or loss of necessary evidence or witnesses.

The only objections raised by the State to a continuance or change of venue, maintained to all of the motions were that it

> "will not serve the best interests of justice and is to serve only the purpose of delaying the orderly administration of justice in the courts of this State." (R. 727) and
>
> "There is no showing that the defendant will be any less busy three weeks, three months, three years from now than he is now, and for that reason the State would like to resist any effort by the defendant on this motion to get a continuance in this case." (R. 728)

No court has ever made any finding of fact that prejudice did not exist against petitioner prior to his indictment and extending through the time of trial.

The only reason ever advanced for denying a continuance or change of venue "in the interests of the orderly administration of justice in the State of Washington was the *ad hominem* conclusion of a Superior Court Judge:

> ". . . I am not at all impressed with your contention that Dave Beck, Sr. cannot have a fair trial in this community at this time. I believe arguments such as these do poor credit to the intelligence and fairness of the high-caliber jurors that we have in this community, and I am satisfied from observing the trial of cases for many years here and observing the type and quality of jurors that we have had, particularly in recent years and recent months, that is is possible to find 12 jurors who can

give a defendant including this defendant, just as fair a trial in December as one could be found in May, I therefore will deny your motion for a long continuance." (R. 726)[18]

This magnificent *non-sequitur*[19] was adopted verbatim by four judges below (R. 840-841), while the other four judges of the court below felt it "unrealistic to believe that a very substantial number of the citizens of the community had not adopted, consciously or unconsciously, an attitude of bias and prejudice toward appellant" (R. 867), and that "if, in the face of all the publicity regarding the Senate Committee hearings . . . anyone realistically could believe there was no showing of bias and prejudice against appellant at the time of the impanelment of the grand jury, then it is impossible ever for anyone to make such a showing." (R. 885).

I. Prejudice Resulting from the Grand Jury Proceedings as Affecting the Trial.

Petitioner asserts that the facts, without argument, show the dire consequences flowing from use of the grand jury in this case under these circumstances. A fair understanding of the functional difference between accusation by information and by grand jury is best illustrated by the issues that

[18] This represented a firmer position than that expressed by the same judge on October 7, 1957 when he incorporated in his formal order denying a previous request for continuance, his opinion that "the attitude toward the defendant within King County will not be substantially different in May, 1958 than it is at the present time, *or will only be slightly different.*" (emphasis supplied) (R. 8).

[19] Petitioner ironically finds himself accused of denigrating everyone in Seattle and the jury system itself, while the judge's own decision was based upon the tacit assumption that petitioner's case had been so hopelessly prejudiced that neither time nor distance could eradicate the stain.

arose only because the State elected to utilize the latter method." These incidents extended throughout the trial and included final argument of the prosecutors. The practical and real prejudice to appellant of the abuse of the grand jury proceedings are:

1. Petitioner's secretary, Marcella Guiry, had claimed the Fifth Amendment upon her interrogation by the Grand Jury. Prior to her attendance at the trial as a witness for the defense, counsel consulted in chambers as to the scope and manner of cross examination. The Court advised the prosecutor that it would not be "proper impeachment," "would be unconstitutional" and that "questions should not be asked concerning those questions and answers before the grand jury." The prosecution nevertheless cross-examined the witness by asking in open court whether or not she had seen a certain exhibit when testifying before the grand jury. This question was immediately followed by the question as to whether her answer before the grand jury was "the same then as it is now." This, of course, required petitioner's counsel either to object before the jury, permit an apparently inconsistent answer to be given, or disclose to the jury that at some previous occasion the witness had claimed the Fifth Amendment. (See R. 845).

This clever tactical trial maneuver could not have occurred except for the fact that the State elected

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". Four of the judges below felt that the almost universal practice of accusation by information in the State of Washington necessarily relegated grand juries to an unrestrained arm of the State used "to assist a prosecutor in investigating conditions and people insulated from investigation by the usual procedures." (R. 832). The other four judges, correctly in petitioner's view, said that whatever procedure the State chose to adopt, it should comply with the law.

to prosecute petitioner through a grand jury proceeding.

2. The prosecution, as part of its case, called the chief special prosecutor, former Mayor Devin, to testify from recollection what petitioner had told the grand jury some six months previously. The prosecutors carefully refrained from exhibiting a transcript of the testimony to Mayor Devin befor he testified,[21] and refused to introduce the transcript of petitioner's testimony. (See R. 844).

Absent grand jury proceedings, the State would have had no opportunity to present the former Mayor of Seattle as a witness for the prosecution or any version of his testimony filtered through six months of obloquy.

3. Fred Verschueren, Jr., an important witness for the defense, had been threatened by four prosecution counsel during grand jury proceedings. He had been cross-examined for hours by the prosecutors in secret. Within two weeks of petitioner's trial he was publicly accused of evading service of a subpoena to testify for the State. When he appeared forthwith at the earlier trial he was not called by the prosecution. The prosecution advised the newspapers that he was not called because the State could not vouch for his testimony. When he testified at the earlier trial he was charged with "concocting" a story for the benefit of the petitioner.

Absent the grand jury proceedings this witness could not have been so thoroughly and wholly unjustifiably defamed and intimidated prior to peti-

[21]. This would have been grounds for demanding a copy of the transcript to determine if the testimony was a refreshed present collection or past recollection recorded.

tioner's trial as to preclude his use as a witness in petitioner's behalf.

4. During the grand jury proceedings an accountant from the firm of CPA's retained by petitioner produced a preliminary worksheet he had prepared from books kept by petitioner's secretary. This worksheet contained numerous errors on its face and its existence was never known to petitioner. The books from which it was taken were not kept by petitioner and were never shown to or exhibited to him. At the trial the State refused to accept the original books when offered by petitioner. The worksheet was the only evidence relied upon by the State to show that petitioner had any knowledge or guilty intention concerning the transaction upon which he was convicted. It was admitted into evidence solely as the document produced by the CPA before the grand jury. (See R. 848, 849).

Absent the grand jury proceedings no conceivable basis under the law could have justified admission of this exhibit into evidence for any purpose.

5. Finally, the prosecutor upon final argument neatly combined both the plethora of publicity and the aura of grand jury impartiality into his final argument.

> "Mr. Beck testified before the Grand Jury, and the Grand Jury was not made up of four ogres who were breathing down the neck of anybody. It was made up of 17 people just like you, 17 citizens selected to sit on that Grand Jury, and 17 people after they heard the testimony of Mr. Regal (sic) and Mr. Verschueren, Jr., returned an indictment . . . " (R. 310).

* * *

"Now we get down to the point where everything is deadly serious. You have a tremendous responsibility. Counsel refers to all this terrible publicity. It is true. The eyes of the entire world probably are upon you right now, and the evidence that has been presented here against this defendant has been widespread. There is no question about that. You should return a proper verdict, that is your responsibility. You are the ones who are going to have to look at yourselves the rest of your lives. You are the ones who are going to have to be with your neighbors and friends and hold your head up high and say, 'I did what my heart and mind told me." (R. 311).

Up until the affirmance by an equally divided court the state never questioned petitioner's right to a fair and impartial grand jury under Washington law. On the contrary, the state conceded that "Except for citing the well-recognized rule that grand juries should be impartial and unprejudiced [petitioner's] cases are not otherwise applicable." See R. 575, n. 6.

In summary, the grand jury proceedings were infected with the massive public clamor against petitioner. The proceeding itself become the focus of the trial and a substantial basis for conviction. No court has yet suggested any rule of law or rational civilized purpose in the procedures adopted except vacuous obeisance to the "interests of justice." In fact, petitioner suffered the savage application of legal lynching suavely masquerading as the spirit of the community.

VI ARGUMENT

A. Summary of Argument

The factual crux of this case is that the entire proceding formed an integral part of the Senate investigating committee's sustained attack upon petitioner in the year 1957. Petitioner stands convicted today because, and solely because, of the committee's successful effort to destroy him as a public figure. This fact has been publicly announced by the committee counsel, and is irresistably borne out by the record.

Petitioner does not contend that he, or anyone else subjected to open congressional hearings, should be immune to prosecution on charges resulting therefrom. What he does contend is that when such hearings are held by a committee and televised nationwide with clear foreknowledge of the results; when they are accompanied and followed by repeated statements of high government officials branding the citizen a thief and a symbol of corruption; and when the charges are pressed long enough and hard enough to infect the entire community with prejudice—then petitioner, or anyone so situated, is entitled under the Fourteenth Amendment (1) to have his case considered by a grand jury which has at least been instructed to act impartially, rather than by one whose manifest bias is exacerbated by the judge and prosecutor; and (2) to be tried by an impartial petit jury even if the only apparent way to obtain one is to allow a reasonable continuance to give the effects of the hostile publicity some chance to abate.

When the activities of the Senate committee began in early 1957, petitioner was president of a

large international labor union. As a long-time resident of Seattle, his name was of course known to virtually everyone in that community. The committee first required him to appear before it (and a television audience numbering in the tens of millions) in March, 1957. The assault upon him in the weeks and months which followed has been described by four of the judges below as "without precedent in the State of Washington."

Petitioner responded by advising the committee in writing that, if required to appear, he would be obliged to assert the privilege against self-incrimination as to any questions touching on his financial affairs. He was then pending indictment by a federal grand jury on tax fraud charges. The committee nevertheless chose to insist upon his appearance, to force him repeatedly to invoke the privilege, and to denounce him for alleged large-scale misappropriation of union funds.

In May, 1957 the process was repeated. By this time petitioner stood indicted in two counts under the revenue laws, and was awaiting indictment on others. Nevertheless he was again interrogated at length, much "evidence" of his alleged misuse of funds was produced, and he was repeatedly attacked for asserting his privilege.

In the weeks and months which followed a flood of publicity hostile to petitioner inundated the country, and particularly King County, Washington. There was virtually no letup until after petitioner was convicted and sentenced to fifteen years in prison. He was accused by the committee, and by countless others who accepted its charges as true, of embezzling over $300,000 in union funds; of misusing his union trust in 52 instances; of be-

ing a labor racketer connected with vice; of being a symbol of corruption; and so on. In July he was indicted herein; in August he was indicted (with alleged co-conspirators) in seven additional tax fraud counts; in October the committee resumed its public hearings, concentrating on petitioner's alleged co-conspirators; in November his son and namesake was convicted on a larceny charge returned by the same grand jury; and the trial of petitioner began a week later.

The grand jury which returned the present indictment was convened on May 20, a few days after petitioner's second televised appearance before the committee. The public furor against him was then at a high pitch. All of the grand jurors knew they had been called specifically to consider charges against petitioner. In the face of this, the court made no effort whatever to excuse prejudiced jurors, to inquire into the existence of prejudice, or even to ask those present to act impartially. Instead, the judge advised the jurors of the reason for their being called; invited them to consider the extrajudicial matters by referring to the committee's "disclosures" that officers of the union (including petitioner) had embezzled hundreds of thousands of dollars; mentioned that King County was probably the only place where such offenses could be tried; and stated that petitioner had claimed the money was borrowed, which presented a factual issue for the grand jury to decide. During the grand jury procedings the prosecutors abused witnesses whose testimony tended to show innocence by accusing them of lying, threatening them with imprisonment for perjury, and the like. The indictment was returned on July 12.

The selection of a trial jury began on December 2, after an interim of unremitting publicity. A high percentage of the veniremen were excused for admitted prejudice which would require evidence to remove. Of the twelve selected after petitioner exhausted his peremptory challenges, all had heard of the case, and eleven admitted having seen and heard the pretrial publicity stemming from the committee hearings.

On this record it is strikingly clear that petitioner was given no chance to be either indicted or tried by jurors who could consider him or his case impartially. At both the grand and petit jury stages he was denied due process and equal protection.

The constitutional right to an impartial grand jury is well established by many prior decisions of this Court, most of which have dealt in some manner with the exclusion of minority groups from jury membership. Implicit in all such decisions, and explicit in some, is the accused's right to have his case considered impartially rather than by persons whose preconceived opinions will lead them to indict him. The institution of the grand jury has been held by this Court to be not a sword in the prosecutor's hand, but a shield between him and the public. Here, it became a sword. To paraphrase one of the opinions below, if ever there was a case where constitutional guarantees of fairness should have been scrupulously observed, this was it. Yet the court and prosecutors, far from trying to protect petitioner from the public furor against him, deliberately worsened the situation by pointing to the congressional committee's "disclosures". No grand juror could be expected to be impartial in this setting, and indeed none was asked to be. The

accusatory process here used thus denied petitioner due process. In addition, it denied him equal protection: a per curiam opinion of the court below has purported by a four-to-four vote (the judges being equally divided on the merits) to deprive petitioner of the protection afforded by the long-standing Washington State statutory and decisional rule that grand jurors must be impartial in order to serve.

As to the denial of petitioner's motions for change of venue, continuance and challenge to the panel—all designed to obtain trial by impartial petit jurors—this Court has held that trial by a fair tribunal is one of the basic elements of due process guaranteed in state prosecutions by the Fourteenth Amendment. If trial by jury is employed, the right is to be judged by jurors who can conscientiously decide the case on the evidence alone, free of undue hostility toward the accused. Where community prejudice is so great that such a panel cannot be obtained, the law requires relief in the form of a change of venue or reasonable continuance to allow the public bias some chance to abate. The period asked by petitioner here was six months, which unquestionably would have been reasonable for the needs of the prosecution as well as the accused. The motion was denied on the untenable ground that no guarantee could be given that the public sentiment would improve in six months, although petitioner asked only the chance that it might. Further, the community prejudice against petitioner was not the result of the private enterprise of newspapers, but the clearly intended consequence of a governmental committee which chose to destroy him publicly with full knowledge that he was pending trial on criminal charges. In these circumstances, the

constitutional requirements of fairness are doubly compelling.

In all cases of this type it is impossible to show the community prejudice conclusively by direct evidence. It is also difficult, at a distance of four years, to reconstruct a transitory period of public furor or hysteria through exhibits and documents. This Court has recognied these problems in holding that prejudice need not be shown directly, and that the assurances of jurors that they will act impartially must be disregarded where the surounding conditions make their accuracy unlikely. In this case the exhibits, the committee hearings transcripts, and the entire history of the interrelated proceedings show, as clearly as can be shown, that both panels of jurors necessarily must have been motivated by the massive, government-engendered publicity. Petitioner was overwhelmed by a single, continuous wave of hostility and denunciation which began in March and ended only with his conviction in December. Against this, his modest requests for procedural relief were denied and availed nothing. Fundamental fairness demands that his conviction be vacated.

B. The State of Washington Denied Petitioner Due Process and Equal Protection of Law with Respect to Grand Jury Proceedings.

This Court has repeatedly been called upon to consider the accusatory methods employed in State criminal actions and to determine whether Grand Jury proceedings and other methods of accusation meet those standards of fairness which are required by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Cassell v. Texas, 339 U. S. 282;
Hernandez v. Texas, 347 U. S. 475;
Re William Oliver, 333 U. S. 257;
State v. Pierre, 306 U. S. 354.

In considering cases of this nature, this Court has invariably expressed the view that grand jurors must be fair and impartial, and that the use of methods of selecting grand jurors which result or might result in a biased or prejudiced Grand Jury requires a dismissal of the indictment. The decisions of the Court on this point have been based upon both the due process and equal protection of the law clauses of the Fourteenth Amendment. See Annotation, 94 L. Ed. 856, at 857.

Thus, in *Cassell v. Texas*, 339 U. S. 282, this Court reversed a conviction because of discrimination in the selection of the Grand Jury. The opinion in that case commenced as follows: (339 U. S. 282-283)

> "Review was sought in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial Grand Jury."

Similarly, in *State v. Pierre*, 306 U. S. 354, this Court held that the standards of impartiality requisite to service as a trial juror were likewise applicable to grand jurors.

The fundamental philosophy underlying the requirement that grand jurors be fair and impartial has been aptly stated by this Court, speaking through Mr. Justice Clark, in *Hoffman v. United States*, 341 U. S. 479, at 485:

> ". . . continuing necessity that prosecutors and courts alike be 'alert to repress' any abuse of the investigatory power invoked, bearing in mind that while grand juries 'may proceed either upon their own knowledge or upon the

> examination of witnesses, to inquire . . . whether a crime cognizable by the court has been committed,' *Hale v. Henkel,* 201 U. S. 43, 65, 50 L. ed. 652, 661, 28 S. Ct. 370 (1906), yet 'the most valuable function of the grand jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused.' Id. 201 U. S. at 59."

The following authorities likewise firmly demonstrate that at common law, as well as under the applicable constitutional provisions, grand juries must be selected in a manner which will conform to fundamental standards of fairness and result, insofar as possible, in an institution which will act fairly and impartially.

Field's Charge, 30 Fed. Cas. 992, No. 18255 (Cir. Ct. Cal. 1872);

1 *Wharton on Criminal Law,* (7th ed. 1874), pp 355, 366, § 452;

United States v. Wells. (D. C. Idaho, 1908), 163 Fed. 313.

The respondent, at p. 14 of its brief in opposition to the Petition for Certiorari herein, has apparently taken the position that the federal right to an impartial Grand Jury is limited to members of minority racial groups. But in *Hernandez v. Texas,* 347 U. S. 475, 477, this Court pointed out that the doctrine of equal protection extends beyond the bounds of race or color. This conclusion seems compelled by fundamental logic, for if there is no federal constitutional right on behalf of every accused person to a fair and impartial Grand Jury, what difference could it possibly make that members of the minority racial group to which a particular defendant belonged were systematically excluded from Grand Jury service? If the rule against such sys-

tematic exclusion is not designed to prevent accusation by a biased or prejudiced Grand Jury, it would seem to have no purpose at all.

The failure or refusal of the State of Washington to recognize petitioner's right to a fair and impartial Grand Jury, or at least to a Grand Jury which was impanelled in a manner which would prevent or tend to prevent the selection of biased and prejudiced grand jurors, and to have the charges and evidence considered by a Grand Jury which was at least instructed and directed to act fairly and impartially, constitutes a denial and deprivation of due process and equal protection of the law in contravention of the Fourteenth Amendment to the United States Constitution.

1. Petitioner was denied the right to an impartial and unbiased Grand Jury.

In its brief in the appellate proceedings in the Supreme Court of the State of Washington, respondent conceded, at p. 23 thereof, "the well-recognized rule that grand juries should be impartial and unprejudiced." (See R. 875, footnote 6.) Nevertheless, four judges of the State Supreme Court, who voted for affirmance of petitioner's conviction, held (R. 829):

> "The Grand Jury in this state is not and was not intended to be a shield for the accused"

and that (R. 831)

> ". . . bias or prejudice on the part of one or more of the grand jurors is not a ground for quashing the indictment."

Until the case against petitioner, there could have been no doubt that the statutes and decisions of the State of Washington required that grand jurors be

fair and impartial. Section 10.28.030 of the Revised Code of Washington provides that at the time of impanelment a grand juror may be challenged:

> "... when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice."

The petitioner herein, not having been held to answer at the time of impanelment, was unable to exercise his right under the aforesaid statute (R. 333).

The interpretation placed upon R.C.W. 10.28.030 by the four judges of the Washington Supreme Court whose opinion will have been controlling if this conviction is allowed to stand, results in the inescapable conclusion that accused persons held in custody or "held to answer" for an offense at the time of impanelment of the grand jury have a protection not afforded those simply called before the grand jury and then accused by indictment (R. 333). An accused person "held to answer" for an offense at the time of impanelment has the right to challenge a grand juror, but one who is merely under investigation (although the known "target" of the grand jury) does not. The former class of persons has the state guarantee of an impartial grand jury; the latter does not.

This in itself raises a question of equal protection. Is such classification (the distinction between those "held to answer" and those not in custody but known to be the subject of the grand jury investigation) sufficiently definite and reasonable to comply with the Fourteenth Amendment's requirement of equal protection of the laws? Is such a construction of the Washington statute by the courts and prosecutors of the State of Washington

a violation of the Fourteenth Amendment to the United States Constitution?

Early Indiana statutes required that challenges to grand jurors must be made prior to the time the jurors were sworn. The court held, however,

> "... where a person is under prosecution for an indictable offence, whether in custody or on bail, it would perhaps devolve no hardship upon him to require that he should take his objection to the grand jury about to inquire into the offence with which he is charged, or any member thereof, by way of challenge, and not permit him to forego the challenge and afterward set up the objection by plea in abatement. But where a person is not under prosecution for an offence, he cannot be supposed to anticipate that a charge may be made against him before the grand jury, and in such a case we think he may plead in abatement of the indictment the disqualification of any grand jurors who found it." *Hardin v. State,* 22 Ind. 351 (1864).

Where an accused sought to challenge grand jurors after they were sworn upon the ground that he could not have a "fair and impartial investigation" of his case, a federal court said:

> "... he was not arrested and imprisoned on any criminal charge, and now brought hither by order of the court, nor is he under bail or recognizance; but because he is not in any of those constrained positions is he any the less entitled to a grand jury of his county, legally qualified under its laws? Surely not." *United States v. Blodgett.* 30 Fed. Cas. 1157, No. 18312, (1867).

See also *McQuillen v. State,* 8 Smedes & M., 587 (Miss. 1847).

> "A prisoner who is in court and against whom an indictment is about to be preferred may undoubtedly challenge for cause, this is not

questioned. But the grand jury may find an indictment against a person who is not in court, how is he to avail himself of a defective organization of the grand jury? If he cannot do it by plea, he cannot do it in any way, and the law works unequally by allowing one class of persons to object to the competency of the grand jury, whilst another class has no such privilege. This cannot be. The law furnishes the same security for all, and the same principle which gives to a prisoner in court the right to challenge, gives to one who is not in court the right to accomplish the same end by plea, and the current of authorities sustains such plea."

The United States Supreme Court reviewed the course of the decisions in 1904 and found that those few decisions denying the right to challenge after indictment were not supportable in principle.

"Some of the cases have gone so far as to hold that an objection to the personal qualifications of grand jurors is not available for the accused unless made before the indictment is returned in court. Such a rule would, in many cases, operate to deny altogether the right of an accused to question the qualifications of those who found the indictment against him, for he may not know, indeed, is not entitled of right, to know, that his acts are the subject of examination by the grand jury." *Crowley v. United States,* 194 U. S. 465 (1904).

It is therefore clear that at common law an accused had the right to challenge a grand jury or its members for bias or prejudice at the time of impanelment, if he was then held to answer for an offense; but one who had been denied the opportunity to interpose such challenge had the right to make an appropriate motion to quash, motion to dismiss, or plea in abatement after an indictment had been

returned against him by a grand jury made up in part of members who were biased or prejudiced.[9]

This common law principle appears to have been carried over into the statute laws of the State of Washington. Section 1 of the Code of 1881 of the Territory of Washington, the origin in virtually its present form of the present Washington statute (R.C.W. 4.04.010)," provided that the common law should apply in the State of Washington to the extent that it was "not inconsistent" with the Code.

The only statute of the State of Washington which respondent may conceivably contend is inconsistent with petitioner's common law right to challenge any or all of the members of the grand jury that returned the indictment herein on the grounds of bias and prejudice, is R.C.W. 10.28.010.[10]

The four judges of the State Supreme Court who voted for affirmance of petitioner's conviction interpreted that statute as limiting the right to challenge *individual members* of the grand jury panel on the ground of disqualification by reason of inability

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[9] See also: *Alabama v. Middleton*, 5 Port. 484 (Ala. 1837); *State v. Hughes*, 1 Ala. 655 (1840); *People v. Romero*, 13 Cal. 90 (1861), *State v. Smith*, (Okla. 1958), 320 P. 2d 719.

[10] "R.C.W. 4.04.010 *Extent to which common law prevails.* The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or the State of Washington nor incompatible with the institutions and conditions of society of this state, shall be the *rule of decision* in all the courts of this state." [1891 C. 17 § 1; Code 1881 § 1; 1877 P. 3 § 1; 1862 p. 88 § 1; RRS § 143.]

[11] "*Challenge to Panel.* Challenge to the panel of grand jurors shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury box the requisite number of ballots to constitute a grand jury, or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit and proved to the satisfaction of the court."

to act impartially and without prejudice under R.C.W. 10.28.030 to such persons who, at the time of impanelment of the grand jury, were "in custody or held to answer for an offense."

However, such interpretation of the statute ignores the following official annotation thereof appearing in the first annotated code of the laws of the State of Washington, prepared by an eminent practitioner who was familiar with the common law and practice under the first nine years of the Code of 1881:

> "A challenge to the panel must be interposed before the grand jury is made up and sworn, provided the defendant has, prior to that time, been held to answer; . . . An indictment found against a person who is refused the privilege of challenging the grand jury is invalid and worthless; . . . A defendant who has not been held to answer before the grand jury is made up and sworn may challenge the panel on his arraignment." (2 Hills Annotated Statutes and Codes of Washington, § 1205, 1891).

The four judges of the State Supreme Court who favored affirmance of petitioner's conviction considered that R.C.W. 10.28.130 [3] fortified their conclusion that petitioner had no right to a fair and impartial Grand Jury, since it is incumbent upon grand jurors to testify of their own knowledge; and respondent has adopted this argument in its brief in opposition to the petition for certiorari herein (Resp. Br. p. 13). Apparently respondent is urging that because a grand juror has knowledge of a

[3] "*Jurors to communicate personal knowledge of offenses.* If a member of a Grand Jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow jurors who may thereupon investigate the same if a majority so order."

crime and reports it to his fellow jurors, the Grand Jury can thereupon act as a biased and prejudiced institution. Such argument appears to be a *non sequitur;* but any doubt about it is resolved by the very next section of the Revised Code of Washington (R.C.W. 10.28.140)[36] which provides that a complainant who institutes a prosecution may not be present at the deliberations of a Grand Jury and may not vote for the finding of an indictment. The respondent's (and the State Supreme Court's) oversight of this last cited Washington statute is highly significant, for it is apparent that the statute is intended as a protection against having a biased member on the Grand Jury. There is no conceivable reason why a grand juror could not testify and then rejoin the deliberations, unless the drafters of the statute intended to safeguard the Grand Jury from the presence of a biased member."

Prior to petitioner's case, the decisional law of the State of Washington appeared to be well settled in favor of the right of an accused person to an un-

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[36] *"Complainant not to take part.* No complainant who may institute a prosecution shall be competent to be present at the deliberations of a Grand Jury, or vote, for the finding of an indictment."

[37] In this connection it is also interesting to note that it is a crime for a grand juror who has been disqualified for prejudice to take part in the proceedings of the grand jury relative to the person who interposed the challenge. "R.C.W. 9.51.040. *Grand juror acting after challenge allowed.* Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, shall be present at, or take part, or attempt to take part, in the consideration of the charge against the defendant who interposed such challenge, or the deliberations of the grand jury thereon, shall be guilty of a misdemeanor." (Notice that the statute refers to a "defendant". There is no defendant until an indictment has been returned.)

biased and unprejudiced Grand Jury. In *State ex rel Murphy v. Superior Court,* 82 Wash. 284, 144 Pac. 32, the Supreme Court of the State of Washington held that it was proper for a judge to excuse certain prospective grand jurors, and in so doing, declared:

> "That it was the policy of the legislature to preserve the right to have an unbiased and unprejudiced grand jury, and that no suspicion should attach to the manner of its selection in all cases, cannot be questioned."

In the later decision of *State v. Guthrie,* 185 Wash. 464, 56 P. (2d) 160, the Supreme Court of the State of Washington held that a motion to quash an indictment was properly denied, but in so doing, the court cited the *Murphy* case, *supra,* with approval and discussed § 10.28.030 of the Revised Code of Washington as follows:

> "While this section may be said to relate to challenges made by interested persons, it is not to be construed as denying to the court the right, upon its own motion, to excuse a juror deemed to be disqualified or incompetent. To deny this right would be out of harmony with the *policy of the law, which charges the court with the responsibility of insuring that qualified and impartial grand jurors are secured.*" (emphasis added)

In states which have statutory provisions similar to the applicable statutes of the State of Washington, it is held that the institution of the Grand Jury must be one which acts fairly and impartially. Illustrative cases are:

State v. Johnson, (N. D. 1927), 214 N. W. 39;

Maley v. District Court, (Iowa 1936), 266 N. W. 815;

Burns International Detective Agency v. Doyle, (Nev. 1922), 208 Pac. 427.

2. *The State trial court erroneously impaneled and instructed the Grand Jury.*

(a) *Public hostility toward petitioner prior to and during Grand Jury proceedings.*

The Grand Jury which returned the indictment herein was convened on May 20, 1957 (R. 312). Prior thereto, on or about February 26, 1957, a United States Senate committee (commonly known as "The McClellan Committee") had commenced an investigation into the affairs and conduct of certain labor unions and labor union officials (R. 646-659). These hearings, of course, were not supervised by any court, and the statements made before the Committee were not subject to rules of evidence or to the right of cross-examination (R. 646)."

It is doubtless fair to assert that the publicity concerning the statements and charges made in the course of these hearings exceeded that of any hearings conducted by any legislative body, including the earlier "McCarthy Committee" hearings.

Most of the hearings of the committee were conducted in public and were extensively reported by all forms of news media (R. 646). Proceedings of the Committee were also televised and broadcast "live"; and the more sensational comments and

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[11] The hearings are contained in several volumes entitled HEARINGS BEFORE THE SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, printed by the United States Government Printing Office. The printed reports of the proceedings of the Committee will be referred to herein as "Hearings", and the volume and page numbers will be designated

testimony concerning petitioner were reported on the daily (and sometimes hourly) radio and television newscasts.

During the hearings, petitioner was repeatedly charged by members of the Committee with crimes and other misconduct. The Seattle area (which comprises King County) was a focal point for the dissemination of publicity concerning these charges and other publicity of a highly derogatory and accusatory nature in view of the fact that petitioner, who was a principal subject of charges made in the course of the hearings, had for many years been a resident and labor leader in this area. The so-called disclosures and "findings" which were made during these hearings were featured in both of the newspapers published in Seattle; and sensational characterizations of the testimony and comments of members of the Committee were flamboyantly displayed in large type, frequently in banner headlines (R. 501 et seq.). The two Seattle newspapers together have a circulation of approximately 313,000; and in addition to the normal circulation, copies of these newspapers are regularly displayed throughout Seattle in a prominent manner so that the general public may observe and read the large type headlines. During the hearings, it was observed that many persons paused to read the accusatory headlines concerning petitioner and were heard to make remarks indicating that they accepted such accusations and reports as being true (R. 501 et seq.).

Sensational reports of the Committee hearings were contained in magazines having national circulation, including TIME, LIFE, LOOK, NEWSWEEK and U. S. NEWS AND WORLD REPORT (R. 502).

In addition thereto, there was published, within a week prior to the return of the indictment, an article in the July 6, 1957 issue of THE SATURDAY EVENING POST, entitled "The Unknown Sleuth Who Trapped Dave Beck" (R. 585). This article likewise contained accusatory and derogatory statements concerning petitioner (R. 586-588).

On March 26th and 27th, 1957, and on May 8, 1957, petitioner appeared as a witness before the Committee. On both occasions he promptly informed the Committee that, upon advice of his counsel, he would assert the privilege against self-incrimination with respect to the matters which were the subject of the investigation. Nevertheless, the Committee repeatedly posed questions to petitioner which petitioner refused to answer, asserting in each instance his privilege against self-incrimination. The Committee permitted this interrogation to be televised and broadcast by television and radio networks throughout the United States; and these broadcasts and telecasts were heard and observed by large portions of the population in King County (R. 649-650). A Seattle television station advertised and announced that it would carry a "live" report of the proceedings on the second day of petitioner's appearance, and the announcement indicated that the station would devote approximately 9 and ¾ hours of its telecasts for that day to reproductions of the hearings and to news comments relating thereto (R. 516).

During petitioner's appearances before the Committee, petitioner was severely criticized by members of the committee for invoking the Fifth Amendment and his right to do so was challenged (R. 652-653). Some members of the Committee ac-

tually asserted during the public hearings that the claim of privilege under the Fifth Amendment constituted an admission of guilt (Vol. 5, Hearings, p. 1537, 1548)."[29]

The purpose of the Senate Committee with respect to petitioner was demonstrated at the time of petitioner's appearance on March 27, 1957. The Chairman then stated (Hearings, Vol. V, p. 1678):

> "We have a witness here that is refusing to answer, and who is hiding behind the Fifth Amendment. The only reason I have continued is to let the country know, let the Teamsters of this country know, the character of transactions that have transpired, about which this witness is unwilling to make disclosures under oath. For that reason, I have indulged the interrogation to this point."

Announcement of the proposed impanelment of a Grand Jury to investigate petitioner was made on April 26, 1957. On May 3, 1957, it was reported that the Prosecuting Attorney had designated a former Mayor of Seattle and a vice-president of the Seattle Bar Association to act as special Prosecutors in the conduct of the Grand Jury proceedings (R. 535-536). This article contained the following statement:

> "The Grand Jury is to investigate possible misuse of Teamsters Union funds by international president Dave Beck . . ."

The Grand Jury was impanelled on May 20, 1957. Between sessions, all of the aforesaid news media were available to the grand jurors. During the month of April, and continuing until the return of

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[29] Neither the Committee Counsel nor the Committee Chairman corrected these inaccurate assertions. Compare the decision of this Court in *Grunewald v. U. S.* 353 U. S. 391, 421.

the indictment on July 12, 1957, reports were circulated by news media with the degree of intensity described above, charging that petitioner:

had illegally obtained profits from a widow's trust fund;

was possibly connected with mail fraud;

had misused his Union position in 52 instances (including instances of misappropriation of funds);

had invoked the Fifth Amendment 60 times;

had stolen $300,000.00 from the Union, and "took" $300,000.00 from the Union;

had been guilty of "rascality";

had committed "many criminal actions";

had used Union funds for the payment of personal bills;

had been indicted by a Federal grand jury for tax evasion.

Most of these reports attributed the charges to the Chairman of the aforesaid Senate Committee (R. 507-642; 680-711; 732-794; 798-810).

The above references are but illustrative of the many prejudicial reports concerning petitioner. It would be impractical to include all such reports in the record to this court. Additional illustrations are contained in the Appendix to the Petition herein and in the Record at 508-642, 682-711, 734-810.

The opinion of Robert F. Kennedy, Chief Counsel for the Committee, concerning the probable effect of the hearings upon the reputation of petitioner is demonstrated in Mr. Kennedy's book "THE ENEMY WITHIN."[*] At page 29 Mr. Kennedy states

[*]. Harper & Brothers, Copyright 1960, Robert F. Kennedy.

that when petitioner appeared before the Committee:

> ". . . I looked at him, and realized that here was a major public figure about to be utterly and completely destroyed before our eyes. I knew the evidence we had uncovered would be overwhelming. It would make him an object of disgust and ridicule. I knew from what we had and from my conference with him in New York that he would have no choice but to plead the Fifth Amendment against self-incrimination. It was no contest now. He couldn't or wouldn't fight back."

And at page 35, Mr. Kennedy states that at the time of petitioner's appearance before the Committee on May 16, 1957:

> "He was a different man from the Dave Beck I had seen at the Waldorf on January 5, or before the Committee on March 26. Now he was dead, although still standing. All that was needed was someone to push him over and make him lie down as dead men should."

The effect of the publicity relating to petitioner is shown by the nature of the news reports. On March 29, 1957 the Seattle Post-Intelligencer reported that Beck was hanged and burned in effigy in Yakima, Washington (R. 522), and the April 8, 1957 issue of TIME Magazine reproduced a picture of this incident (R. 525). On April 12, 1957 U. S. NEWS & WORLD REPORT reported that petitioner's standing in Seattle had been "badly hurt" in an article entitled "How Dave Beck Rates Now in His Home Town" (R. 531). On May 27, 1957 TIME Magazine published an article under the caption "A CITY ASHAMED—Dave Beck is on Seattle's Conscience" (R. 573). Both Seattle newspapers on May 18, 1957 prominently reported a derogatory

criticism of petitioner by the Episcopal Bishop of the Diocese of Olympia (R. 560-561).

Four of the judges of the Supreme Court of the State of Washington stated that (R. 867):

> "The amount, intensity, and derogatory nature of the publicity received by [petitioner] during this period is without precedent in the State of Washington.
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> * * *
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> "The natural effect of this publicity was that, in the eyes of the average citizen, the character of appellant had been thoroughly discredited in the Seattle area on or before May 20, 1957.
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> "In view of the circumstances shown by the undisputed facts stated in the affidavits in this case, I think it would be unrealistic to believe that a very substantial number of the citizens of the community had not adopted, consciously or unconsciously, an attitude of bias and prejudice toward appellant at the time the grand jury was convened. If ever there was a case which required the most stringent observance of every safeguard known to the law to protect a citizen against bias and prejudice, this was it."

It was against this background that the grand jury was convened.

(b) The trial court, in the impanelment of the Grand Jury, made no effort to determine whether or not any prospective member was prejudiced against petitioner; and in fact accentuated and intensified the hostility and prejudice already existing against petitioner in the minds of the grand jurors.

In selecting the grand jurors, no prospective member was asked whether he had read anything about the alleged misconduct of petitioner as re-

ported in connection with the hearings of the Senate committee or as elsewhere reported. No juror was asked if he had heard on the radio or seen on television any part of the Senate committee hearings. There was no interrogation of the jurors to ascertain whether any of them had heard or participated in any discussions concerning such matters. Although the court directed the attention of the grand jury specifically to petitioner as "the President of the Teamsters Union" (R. 329, 330), no juror was asked whether or not he had any preconceived notions as to the guilt or innocence of petitioner of the charges publicly made against him in the Senate hearings and adverted to by the court (R. 329).

In one of the opinions of the Supreme Court of the State of Washington, it was stated (R.870):

> "In view of the unprecedented publicity which had been given to the Senate Committee hearings within the three months preceding the impanelment of the grand jury, I think that the jurors should have been interrogated for the existence of possible bias and prejudice against the officers of the teamsters' union."

After the grand jury was selected and the impanelment completed, the court explained and commented on the fact that the institution had been used so infrequently in the State of Washington that most people, even lawyers, were unfamiliar with its procedure and purposes (R. 327). The court then addressed the grand jury as follows (R. 329-330):

> "We come now to the purpose of this grand jury and the reasons which the judges of this court thought sufficient to justify the expense to the county, and the inconvenience to and

sacrifice by you, which this grand jury session will require.

"It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members. It has been alleged that many of these transactions, through which the money was siphoned out of the union treasury, occurred in King County. Such crimes, if committed, cannot be punished under Federal law, or under any law other than that of the State of Washington, and prosecution must take place in King County. The necessary criminal charges can only be brought in this county upon indictment by the grand jury or information filed by the prosecuting attorney.

"The president of the Teamsters Union has publicly declared that the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain."

* * *

"To completely investigate all of these items may be beyond the energy and endurance of yourselves, the prosecutors and investigating staff. The financial burden of such a complete investigation may be beyond the resources of King County. I urge you to do all that you can within practical limitations to ascertain the truth or falsity of these charges."

The court failed to instruct the grand jury to disregard the then current hostile publicity directed toward petitioner, nor was the grand jury admonished to consider the evidence presented to

it in a fair and impartial manner and without bias or prejudice toward petitioner. But on the very afternoon of the day that the grand jury was selected and sworn, the following articles appeared in THE SEATTLE TIMES (R. 563-565):

"BECK OUSTED FROM A.F.L.-C.I.O. POSTS—
TEAMSTER CHIEF FOUND GUILTY OF
'VIOLATING TRUST.'"

"SOLON DENIES INFRINGING BECK'S RIGHTS"

"May I say that the committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses."

And on the following morning the SEATTLE POST-INTELLIGENCER displayed the following banner headline (R. 568):

"McCLELLAN LAYS 'MANY CRIMINAL
ACTS TO BECK."

(c) *Petitioner, as an officer of the Teamsters Union, was a member of a class requiring, and entitled to, the equal protection of the laws of the State of Washington.*

Under the peculiar circumstances of the present case, petitioner was entitled to a fair and impartial grand jury by virtue of the equal protection clause as well as the due process clause of the Fourteenth Amendment. In *Hernandez v. Texas*, 347 U. S. 475, involving an indictment of a person of Mexican descent, this court stated (347 U. S. 478):

"... community prejudices are not static and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact."

In this case the record conclusively establishes

that officers of the Teamsters Union (and possibly other unions) at the time and place and under the circumstances in which the Beck Grand Jury convened, constituted a class which urgently required the protection of the equal protection clause of the Fourteenth Amendment. Indeed, the court which impaneled the Grand Jury referred collectively to the "officers of the Teamsters Union" in his charge (R. 329), and made specific references to the "disclosures" of the McClellan Committee indicating that:

> Officers of the Teamsters Union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that Union—money which had come to the Union from the dues of its members . . ." (R. 329)

Surely, the trial court's unvarying repetition of the questions: (1) "Have you ever been a member of the Teamsters Union, or the Retail Clerks, or any affiliated union?" (2) "Are you acquainted with any officer of the Teamsters Union?" (3) "Are you now or have you ever been an officer in any union?" put to each and every prospective grand juror who was examined, could only have been for the purpose of intentionally and systematically excluding from the grand jury panel which returned the indictment in petitioner's case, every officer of the Teamsters' Union, or any other union. (See R. 312-326). At the very least, it constituted a method of grand jury selection which shows *prima facie*, intentional discrimination against members of such class (union officials, and especially officers of the Teamsters Union) requiring respondent to meet the burden of proving an absence of such discrimination. (Cf. *Avery v. Georgia*, 345 U. S. 475.)

The court also advised the jury that petitioner had "publicly declared that the money received from the Union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain." (R. 329-330)

The latter was inaccurate and presented to the Grand Jury a wholly improper issue of fact. Petitioner never contended publicly, nor in his Grand Jury testimony, nor at the trial, that the $1900 which he was charged to have stolen was a loan.

Such instructions and comments to the Grand Jury, in addition to singling out and defining a certain group of individuals within the community for the specific obloquy, hatred and contempt of the public at large and particularly of the Grand Jury, specifically violated the mandate of Article IV, Section 16 of the Washington State Constitution which provides:

> "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Similarly, the above instructions, together with the court's reference to the expense to be incurred by the county in conducting the Grand Jury proceedings and to the sacrifice by the grand jurors was in violent disregard of the declarations of the Supreme Court of the State of Washington in *State v. Guthrie*, 185 Wash. 464, 56 P. (2d) 160, to the effect that the policy of the law:

> ". . . charges the court with the responsibility of insuring that qualified and impartial grand jurors are secured."

Under these circumstances, and in light of the hostility engendered against petitioner and other members of the class of "officers of the Teamsters Union" by the publicity previously referred to (in

part created by an agency of the United States Government), it is submitted that petitioner was a member of a minority group or class requiring the protection of the equal protection clause of the Fourteenth Amendment.

(d) The trial court specifically denounced petitioner in its charge to the Grand Jury.

Until petitioner's case, it had been the uniform rule that an indictment returned by a Grand Jury would be set aside if the defendant named in the indictment had been denounced by the court which impaneled or charged the Grand Jury, or if such court specifically directed the attention of the Grand Jury to the defendant. The following authorities are illustrative:

Fuller v. State, (Miss. 1905) 37 So. 749, 750;
Blake v. State, (Okla. 1932) 14 P. (2d) 240;
Clair v. State, (Neb. 1894) 159 N. W. 118;
State v. Will, (Iowa 1896) 65 N. W. 1010.

In this case, the trial court, in charging the Grand Jury, specifically directed its attention to "the President of the Teamsters Union" in connection with the "disclosures" of the McClellan Committee (R. 329-330); and, during the impanelment of the grand jury, inquired of one of the prospective members, within the presence and hearing of the entire panel:

> "You are not acquainted with . . . Mr. Beck?" (R. 324)

It will be difficult, if not impossible, for respondent to show any realistic distinction between that question, and the question employed by the trial court in *Fuller v. State, supra,* ("Have you ever

heard of Charlie Fuller?") which was held to require quashing of the indictment.

3. The state prosecuting attorneys engaged in prejudicial misconduct before the grand jury.

In petitioner's case, grand jury witnesses who testified to facts favorable to petitioner were threatened with perjury; and the prosecutors, in the presence of the grand jurors, expressed disbelief in their testimony. This constituted grave misconduct. It was for the jurors, not the prosecutors, to determine the creditibility of the witnesses. It is improper for a prosecuting attorney, in the course of grand jury proceedings, to threaten witnesses or to argue issues of evidence. On the contrary, the secrecy which surrounds grand jury proceedings demands that a prosecutor act with the utmost fairness. The prosecutor's duty is simply to present to the grand jury facts sufficient to convince them that there is probable cause for a trial upon the merits. There is no cross-examination of witnesses. The accused has no right to appear. Hearsay evidence is admissible against the accused. Thus, the prosecutor's burden is slight. If in secrecy the prosecutor may threaten witnesses with prosecution and testify as to his own knowledge (when he would be rebuked for such conduct in open court), then grand juries are the vehicle of state oppression rather than protection for the citizen. Whatever excuse there may be for misconduct in a courtroom, there is none in the secrecy of the grand jury room. No person can be safeguarded against the possibility of unfounded accusations where, as here, the prosecuting attorney argues to the grand jury that witnesses who testify to facts favorable to the prospective defend-

ant are committing perjury. Such conduct most seriously violates the fundamental standards of fairness which have been defined by this Court. This is particularly true of the statement by the prosecutors that "no person in this room" believed the testimony of the witness. The fact is that many of the jurors, in the absence of such comment, might have believed the testimony of the witness, but were persuaded not to do so by the fact that the prosecuting attorneys did not choose to believe this testimony. The prosecuting attorneys, however, were not the persons whose function it was to determine the truth or falsity of the testimony. That function belonged exclusively to the grand jury.

One of the most thorough analyses of the duties of a prosecutor in the conduct of the grand jury proceedings is contained in the case of *U. S. v. Wells*, (D. C. Idaho, 1908) 163 Fed. 313. In that case the court dismissed an indictment because:

> ". . . a commendable zeal which gathered force as it progressed, finally expanded into an exaggerated partisanship wholly inconsistent with the semi-judicial duties of a public prosecutor, and entirely unnecessary to the execution of the power imposed." (p. 329)

In defining the power of the prosecutor before the grand jury, the court declared (p. 327):

> ". . . the provision that the prosecuting attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to a matter cognizable by them, was meant to confine him to those traditional duties of giving advice concerning procedure and the like, to the examination of witnesses, as expressly provided and not to the expression of opinions or the making of arguments.

To the same effect are the following authorities:

4 *Wharton's Criminal Law and Procedure* (1957) § 1716, p. 480;

Attorney General v. Pelletier, (Mass. 1922) 134 N. E. 407;

State v. Crowder, (N. C. 1927) 136 N. E. 337;

People v. Bennin, (1946) 61 N. Y. S. (2d) 692.

In the State of Washington, commendable zeal does not permit a prosecutor to step beyond reasonable bounds of propriety in the open court room. Intemperate conduct there, even subject to adversary check and instructions of the trial judge, can and has resulted in reversals of convictions. *State v. Case,* 49 Wn (2d) 66, 298 P. (2d) 500. The due process clause of the Fourteenth Amendment requires no less.

In *State v. Montgomery,* 56 Wash. 443, 105 Pac. 1035 (1909), the Washington Supreme Court reversed a conviction for staturory rape. The court, after determining that there was sufficient evidence to sustain the verdict, nevertheless held:

> "But whether the appellant was guilty or innocent he was entitled to a fair and impartial trial, according to the forms of law, and we are constrained to hold that this right was denied him."

The prosecuting witness, in her testimony, had denied any rape. The prosecutor then stated in open court that the witness had told him the contrary many times and that the witness must have been tampered with and bought. He then asked the witness leading questions. The witness was finally withdrawn from the stand, and taken to the prosecutor's office where the prosecutor told her that he would send her to jail for perjury. The Supreme Court held that the county prosecutor was a quasi-

judicial officer, and in that connection stated at 56 Wash. 447:

> "While it is important that the appellant should be punished for his crime, if guilty, it is of far greater importance that settled principles designed for the protection of life and liberty should not be overthrown; and if persons accused of crime cannot be convicted without using against them testimony wrung from unwilling witnesses by threats of criminal prosecution and imprisonment, it is better by far that they should go free than that such practices should receive the sanction and approval of the courts.
>
> "It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal, in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness towards the accused, is the highest commendation that they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims."

Surely the prosecutor is no less a state quasi-judicial officer when he escapes the scrutiny and supervision of the trial court and enters the secrecy of the grand jury chamber. *Mooney v. Holohan*, 294 U. S. 103.

The conduct of the prosecuting attorneys in the grand jury room is in part set forth in Appendix A to the opinion of the four judges of the Supreme

Court of the State of Washington who were in favor of reversal of petitioner's conviction (R. 887 to 895). This court's attention is respectfully directed to that portion of the record for illustrative examples of the actions and statements by the prosecuting attorneys in this case which petitioner contends were grossly improper under any standard of ethical conduct. Measured by the conduct which this court condemned in *Berger v. U. S.*, 295 U. S. 78, the conduct of the prosecutors in the grand jury proceedings herein constituted gross and prejudicial misconduct; and in this case such misconduct was the more prejudicial because, having been committed in secret, it was not subject to corrective instruction by any court.

The present record compels the conclusion that actual prejudice infected the grand jury proceedings, or, at the very least, that the situation was so charged with "potential prejudice" that reversal is required. Compare *Hudson v. North Carolina*, 363 U. S. 697. Further, this court has consistently held that the state's available alternative of accusing by information is no answer to a proceeding to set aside a defective indictment; if the state elects to proceed by grand jury, it must do so in a constitutional manner. See *Eubanks v. Louisiana*, 356 U. S. 584.[31]

[31] In connection with the question of whether the indictment in this case should be set aside it would seem that this Court may, in good conscience, consider the provisions of R.C.W. 10.01.020 which provides that in cases in which an indictment is set aside, computation of the period of limitations shall commence upon the date the indictment is set aside. Accordingly, the respondent has never contended that dismissal of the indictment in this case would bar further prosecution. We believe this type of statute to be most unusual. However, the judges of the court in which petitioner was convicted appear to be familiar with the

This raises the not so incidental question of why the State of Washington chose to proceed by *indictment* in this case (a procedure so unusual in the State of Washington that even lawyers and judges are admittedly somewhat confused by it (R. 327), rather than by information. During the course of the Senate investigation and Hearings previously referred to, members and representatives of the McClellan Committee conferred and cooperated with law enforcement agencies of the State of Washington, including the office of the prosecuting attorney for King County; and the prosecuting attorney for said county issued various statements concerning the Hearings which were reported in the public press (R. 647-649). Since the Senate Committee had broad inquisitorial powers, including the power to subpoena witnesses, books and records, it cannot be said that the State of Washington required the duplication of such inquisitorial powers by the grand jury in order to obtain the evidence necessary to commence a prosecution. Even if the investigative functions of the grand jury were helpful in that regard, respondent still had the option of proceeding by information based upon evidence so obtained (R. 824). Can it be that a fair-minded and impartial

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statute and the local practice thereunder of dismissing the indictment and proceeding by information (R. 824). The statute, insofar as pertinent, reads as follows:

"R.C.W. 10.01.020 *Limitation of Actions.* Prosecutions . . . may be commenced . . . for all other offenses the punishment for which may be imprisonment in the penitentiary, within three years after their commission; *And further provided,* that where an indictment has been found, or an information filed, within the time limited for the commencement of a criminal action, the indictment or information be set aside, the time of limitation shall be computed from the setting aside of such indictment or information."

public prosecutor could not in good conscience regard such evidence as sufficient to support a prosecution commenced by information, but was willing, like Pontius Pilate, to permit an inflamed and impassioned grand jury to relieve him of the responsibility imposed by public pressure?

4. The improper and unconstitutional grand jury proceedings permeated and affected the subsequent trial and appeal in the state courts.

The trial in this case commenced on December 2, 1957 amid the frenzied clamor of anti-Beck publicity of the nature and intensity previously described. Twelve days later, on December 14, 1957, the jury returned a verdict of guilty (R. 27).

The evidence offered by respondent and petitioner was commented upon by the Supreme Court of the State of Washington in its opinions (R. 828-896) and discussed in the Petition herein in some detail. A capsule summary appears in Appendix "A" hereto.

In brief, petitioner was convicted of unlawfully appropriating to his own use the sum of $1,900, the proceeds from the sale of a Teamster owned automobile, received by his secretary and deposited to one of his personal bank accounts without his knowledge. The only evidence in any manner calculated to connect petitioner with the transaction or show his knowledge or intent to wrongfully appropriate such funds consisted of two items. One was exhibit 17, a rough work-sheet of an accountant in the Certified Public Accounting firm that prepared petitioner's federal income tax returns. This exhibit was produced during the course of the grand jury proceedings. All the testimony concern-

ing it showed that petitioner had not directed its preparation, nor ever seen it, nor even known of its existence. The other item of evidence was the testimony of ex-Mayor Devin, one of the special prosecutors for the Beck grand jury, to the effect that his recollection of petitioner's grand jury testimony was that petitioner had there testified that upon his return to Seattle from a business trip in February of 1956, petitioner had for the first time learned of the sale of the automobile and deposit of the proceeds to his account; that petitioner had thereupon given $1,900 to Fred Verschueran, Jr., a Teamster bookkeeper, to be deposited to the account of either the Western Conference or the Joint Council, whichever should turn out to be the owner of the automobile (R. 857). Mr. Verschueren had also been summoned before the grand jury with the results previously indicated (R. 887-895).

In short, the grand jury proceedings in petitioner's case were converted into a pretrial discovery device for the prosecutor, with the record and results thereof jealously guarded and concealed from petitioner and his counsel, but exposed to the speculation of the trial jury through the testimony of Mayor Devin and an accountant's scratch pad (containing admittedly tentative and erroneous notations). The secrecy of the grand jury proceedings was used as a device to prevent or limit the effective cross-examination of Mayor Devin, but was conveniently ignored whenever it was to the advantage of the state's case to do so.

Under such circumstances the institution of the Grand Jury was employed by the State of Washington not as a bulwark of protection to stand be-

tween the prosecutor and the accused (cf. *Hoffman v. United States,* 341 U. S. 479 at 485), but as a weapon of offense to gain tactical advantage for the prosecutor at the trial.

It may thus be seen that the prejudicial effect on petitioner of the improper and unconstitutional proceedings of the grand jury did not end with the return of an indictment. The theory upon which the Supreme Court of the State of Washington approved the admissibility of Exhibits 17 and 18 would not even have been arguable but for the production of Exhibit 17 pursuant to the grand jury's subpoena. Further, the prosecutor effectively prevented the defendant from calling Fred Verscheuren, Jr. as a witness in his defense by the browbeating and intimidation of such witness before the grand jury. The prosecutor also seized upon the advantage obtained through the grand jury proceedings to discredit the witness Marcella Guiry, petitioner's secretary, at the trial, by intentionally calling the jury's attention to the fact that she had sought protection of the Fifth Amendment during her grand jury testimony, even though such questioning had been prohibited by a ruling of the trial court. The trial court denied petitioner's motion for a mistrial based on this conduct.

In final rebuttal argument before the trial jury the prosecutor made two statements which revealed his deliberate strategy (a) to make full use of the bias and prejudice built up by the massive campaign of publicity hostile to petitioner in order to secure a conviction, (b) to invite the jury to draw an inference of guilt from the failure of petitioner to testify concerning the receipt of the $1900 or the

subsequent disposition thereof, and (c) to persuade the trial jury that, since the grand jury had heard testimony from petitioner and Fred Verschueren, Jr. and had thereafter returned the indictment against petitioner, the grand jury must not have believed their testimony; and that therefore the trial jury should not believe it either. These excerpts from the argument of the prosecutor, Mr. Regal, are set forth at R. 310-311. Four judges of the Washington Supreme Court "held" that such argument was not erroneous because it amounted to no more than a fair reply to the argument of petioner's counsel (R. 858-860). The portion of the argument of petitioner's counsel to which the prosecutor's comments are said to "reply" are reproduced at R.307-310.

It is submitted that this prejudicial misconduct of the prosecuting attorney in itself constituted a denial of due process of law; when taken in the context of the almost unbelievable intensity of the denunciation of petitioner through public news media to which every one of the trial jurors who tried the case was exposed (R. 47-307), it is obvious that the purpose, and likely result, of such misconduct was to magnify and accentuate the errors which had occurred with respect to the grand jury proceedings.

In accordance with the rules applicable in the State of Washington, the conviction of petitioner was appealed to the Supreme Court of the state. The case was first argued in March, 1959 and the first opinions of that court were filed in February of the following year (R. 828-896). Eight judges considered the appeal and were equally divided in their decision; the court nevertheless filed a per

curiam statement purporting to affirm the conviction. This purported affirmance was in direct violation of the Constitution and statutes of the State of Washington and the rules of the Supreme Court of the State of Washington, which provide that a concurrence of a majority of the judges shall be necessary to pronounce a decision. The applicable constitutional and statutory provisions, and the applicable court rules are set forth herein at pp. 3-5.

Upon petition for rehearing and reargument, the members of the Supreme Court remained equally divided in their respective opinions on the merits, but a majority of those sitting apparently voted to allow the conviction to stand despite the lack of a constitutional majority for affirmance or reversal (R. 904). Prior to one of the rearguments, one of the judges who heard the case (and who voted for affirmance) is reported to have stated in a press conference that the case had political implications because of the fact that three of the judges of the State Supreme Court were candidates for reelection in the November 1960 election (Seattle Post-Intelligencer, June 3, 1960, "Beck Case May Be Election Issue" (R. 903).

The impact upon petitioner of the purported affirmance of his conviction by the equal division of the Supreme Court of the State of Washington on the fundamental issue of petitioner's federal constitutional right to a fair and impartial grand jury can best be illustrated by the argument of respondent in opposition to the Petition for Certiorari herein. At p. 13 of respondent's brief in opposition to the Petition, respondent appears to contend that, *because* the State Supreme Court was unable to decide whether or not petitioner had a right, under

the laws of the State of Washington, to a fair and impartial grand jury, this court is prohibited from determining whether or not petitioner has such a right protected by the federal constitution. Thus, four judges of the Supreme Court of the State of Washington, acting contrary to the Constitution and laws of the state, are being permitted by respondent to imprison petitioner even though it is conceded that these four judges cannot and have not determined the Washington law on a critical issue in the case. This itself, we submit, is a violation by respondent of petitioner's right to due process and equal protection of the laws under the Fourteenth Amendment. The constitutional guarantees of the Fourteenth Amendment apply to all acts of the state, including the acts of its judiciary. See *Carter v. Texas*, 177 U. S. 442. Therefore, in those states, such as Washington, where a right of appeal exists in every criminal case, that right must be afforded to each and every defendant in a manner consistent with the methods of appeal which are provided and in accordance with the federal guarantees of equal protection and due process.

See *Frank v. Magnum*, 237 U. S. 309;
Dowd v. United States, 304 U. S. 206;
Kyle v. Wiley, 78 A. (2d) 769, (1951).

A constitutional and statutory system of appeal cannot be arbitrarily applied or ignored as the state courts see fit. It must rather be applied in conformity with the plain meaning of its provisions and equally to all appellants.

See: *Griffin v. Illinois*, 351 U. S. 12;
Eskridge v. Washington State Board, 357 U. S. 214;
Cole v. Arkansas, 333 U. S. 196.

Under these decisions, where an appellate procedure is established by a state for criminal prosecutions, the procedure must be followed in all cases. But the State of Washington has "decided" in violation of the foregoing principle, to imprison petitioner without benefit of the appellate procedure prescribed by its constitution, statutes and court rules (which is available to every other person charged with a criminal offense in the State of Washington), because its Supreme Court is unable to decide, in accordance with such procedure, whether or not petitioner has a "federal constitutional right to a fair and impartial Grand Jury" (*Cassell v. Texas,* 339 U. S. 282 at 283).

Thus the trial itself, as well as the state appellate proceedings in this case, were infected by the invalid proceedings of the unconstitutionally selected and conducted grand jury which indicted petitioner.

C. The Denial of Petitioner's Motions for Continuance and Change of Venue Deprived Him of Due Process of Law.

As indicated above, the Senate committee hearings directly resulted in a series of events which kept the committee's charges against petitioner firmly fixed in the public attention continuously from the spring of 1957 until the time of trial in December, 1957. Following the indictment of petitioner on July 12, the committee resumed its public and highly publicized hearings in October, (when petitioner was originally scheduled to go to trial), continuing to attack and vilify both petitioner and other officials of the Teamsters Union with whom his name was intimately connected in the public mind. In August he was indicted by a federal grand

jury on several counts of tax fraud concerning the same transactions which had been the subject of the committee proceedings in March and May. In November his son stood trial in Seattle on two counts of grand larceny. The subject matter of that trial, like the present case, concerned the sale of union-owned automobiles. Petitioner's appearance as a witness in his son's behalf provoked further sensational publicity. The conviction of the younger Beck was heralded in the local newspapers with headlines such as "DAVE BECK, JR., GUILTY AS THIEF". The trial of petitioner himself followed a few days later.

It is beyond dispute that the Senate committee's "exposure" of petitioner and insistence upon forcing him repeatedly to invoke the privilege against self-incrimination before a nation-wide television audience, followed by the indictment in the instant case, the indictment in the tax fraud case, the resumption of the committee hearings, and the trial of petitioner's son, together comprised the foremost public event in Seattle and the State of Washington in the year 1957. The attendant publicity was at all times intensive and inflammatory, continuing to the very eve of petitioner's trial. The following excerpts from the exhibits submitted by the petitioner in support of his motions for continuance and change of venue are merely illustrative of the hostile publicity which was circulated throughout King County from July 12, the date of the indictment, until December 2, the date the trial began:

Seattle Times, July 12, 1957 (Tr. 590)

JURY INDICTS BECK AND SON ON GRAND-LARCENY COUNTS

Seattle Times, July 12, 1957 (Tr. 593)

KENNEDY HAILS JURY FOR INDICTMENTS

Look Magazine, August 6, 1957 (Tr. 597):

THE DIZZY DESCENT OF DAVE BECK

Seattle Post-Intelligencer, August 20, 1957 (Tr. 603)

PROBE TOLD BECK OKd 'PHONY' UNITS

Saturday Evening Post, Augsut 24, 1957 (Tr. 605)

CAN LABOR LIVE DOWN DAVE BECK?

Seattle Post-Intelligencer, September 22, 1957 (Tr. 615)

UNION CORRUPTION HIT BY SENATOR

Seattle Times, Sepember 25, 1957 (Tr. 618)

BECK, BREWSTER 'HAD NO INTENT' TO REPAY FUNDS—A.F.L.-C.I.O. Charges

October 1, 1957 (Tr. 641)

BECK CALLED SYMBOL OF CORRUPTION

Seattle Times, (Tr. 642)

HOFFA-BECK DEAL HINTED BY 2 RIVALS

Seattle Times, October 10, 1957 (Tr. 682)

HOFFA'S ELECTION VIOLATED UNION RULES — McClellan

Life Magazine, October 14, 1957 (Tr. 687)

MUSCLES RULE THE TEAMSTERS

Defeated Boss Beck Glumly Serves Last Time as Head of Convention

Seattle Post Intelligencer, October 23, 1957 (Tr. 692)

JURY TOLD BECK CARRIED MONEY BAG

Seattle Post-Intelligencer, October 25, 1957 (Tr. 693)

TEAMSTERS ASK 1 YEAR TO CLEAN HOUSE

Seattle Post-Inteligencer, October 30, 1957 (Tr. 700)

PROBE TOLD SEARS PAID BECK'S WAY TO FUNERAL OF TOBIN

Seattle Times, November 1, 1957 (Tr. 703)

CORRUPTION ASTONISHING, SAYS MEANY

Seattle Post-Intelligencer, November 1, 1957 (Tr. 707)

FORMER IKE AID TELLS OF WORKING FOR BECK

President Eisenhower's 1952 labor advisor disclosed today he served as a $5,000-a-year aide to Teamster boss Dave Beck from 195[illegible] "until I got my belly full" in 1955.

Seattle Times, November 12, 1957 (Tr. 745)

DAVE BECK, JR., LARCENY TRIAL OPENING

Seattle Times, November 22, 1957 (Tr. 778)

'MY BOY HAS DONE NO WRONG!' DAVE BECK, SR., TELLS JURY

Seattle Times, November 24, 1957 (Tr. 791)

DAVE BECK, JR., CONVICTED

Seattle Post-Intelligencer, November 27, 1957
(Tr. 805)

BECK EFFORT TO POSTPONE TRIAL REBUFFED

Asserting that the McClellan committee's denunciations of him and the resultant flood of inflammatory publicity had created a public atmosphere of hostility and prejudice which would make a fair trial impossible, petitioner moved in the alternative for a change of venue or for a continuance of six months (R. 4, 5). The trial court denied these motions on the grounds that the jurors of King County were generally of high calibre, and that there was no guarantee that petitioner could obtain a fairer trial after the passage of a reasonable time (R. 840, 841). Petitioner's challenge to the panel of prospective jurors, based upon the same grounds, was also denied (Tr. 40).

At the commencement of trial, four prospective jurors were summarily excused for the reason that they had served at the trial of petitioner's son, which had ended a few days earlier (Tr. 47). Following this the trial judge addressed the jury panel as follows:

> "To put the same thing in another way, and I am not now asking you a question to answer yet but I want you to keep this factor in mind, the problem of this question of reading, hearing, and seeing as a member of the public might be put this way. Do you now have an opinion or an impression as to the guilt or innocence of the accused which would require evidence to remove from your mind? . . . Now *intelligent persons know that impressions they have received from what they have read in the newspapers or heard on the radio or seen, read and*

> ***heard on the TV, are not always true.*** *No intelligent person would rest a decision on such an impression without a more formal and more convincing type of proof.* Now with those factors in mind with reference to this subject, I wish to ask you this question. I wish you to search your hearts and minds for the answer.
>
> Now if any of you from what you have read do feel that you have in your mind an opinion as to the guilt or innocence of the defendant or such an opinion as would require evidence to remove by either side, please hold up your hands." (Tr. 52-53) (Emphasis added)

Despite this invitation to the prospective jurors to appear "intelligent" by denying any preconceived opinion", 19 panelists admitted prejudice and were excused. These nineteen comprised more than thirty-six percent of the total of 52 veniremen who were subjected to any degree of voir dire examination. of the remaining thirty-three, nine were excused for personal reasons, one was excused because her husband was a prospective witness, six (the maximum permitted by law) were challenged peremptorily by the defense, five were challenged peremptorily by the State, and twelve, plus an alternate, were sworn to try the case. All of the veniremen, with one exception, knew of the case in advance of trial (R. 52). The exception, prospective juror Ryan, was the subject of the prosecution's first peremptory challenge (R. 165).

The voir dire examination showed that all twelve jurors who were finally permitted to serve had

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[11] When petitioner objected to the trial court's admonition on the ground that it would influence the veniremen's responses Tr. 57,) the court responded in part as follows:

"Concerning the newspapers, I think a person knows that everything in a newspaper is not true." (Tr. 58)

heard of the case; that eleven definitely and possibly all twelve, had heard, seen or read the adverse publicity concerning petitioner; that seven definitely, and possibly ten, had discussed, or been present at discussions of, the charges against petitioner. The following table sets forth the appropriate transcript references for each of the twelve jurors:

Jurors	*Heard of Case*	*Read or seen adverse publicity*	*Discussed or been present at discussion of charges against petitioner*
No. 1 Inez Degering	73	78	78
No. 2 Eleanor Eaken	121	uncertain	uncertain
No. 3 Robert Moe	256	261	uncertain
No. 4 Peter C. Peterson	246	250	uncertain
No. 5 Frank Walton	283	288	283
No. 6 John Vukich	60	60	60
No. 7 Anna Harold	289	295	290
No. 8 Mrs. Cecile Wilson	208	211	no
No. 9 Elsie Fields	64	151	no
No. 10 R. H. Westenberg	50	156	51
No. 11 Charles Hickling	265	272	272
No. 12 Paul Lange	50	165	51

Of the nineteen panelists who were excused for admitted prejudice, all but six were excused before being questioned specifically on the effects of the Senate committee hearings and their aftermath. In each of the six instances where the subject was reached, the veniremán's response showed affirmatively that the disqualifying prejudice stemmed from that source. This aspect of the voir dire examination may be summarized as follows:

Prospective juror Cox had observed only "part of one appearance" of petitioner before the senate

committee, yet attributed his prejudice at least in part to that experience (Tr. 72).

Prospective juror Helen Brown saw only "five or ten minutes" of the televised committee hearings, as a result of which evidence from the defense would have been required to change her state of mind (Tr. 106, 108).

Prospective juror Harold Brown based his adverse opinion, which would require evidence to counteract, solely on the comments of friends and associates who had read or seen some of the publicity concerning petitioner (Tr. 169).

Prospective juror Hubbell referred to the pretrial publicity as including "a lot of evidence" to suggest misappropriation of union funds (Tr. 195).

Prospective juror Hebert, answering a question of the trial judge, stated that her preconceived opinion did not arise from what she had heard so far in the court room, but "from what I have read and heard and spoken of and heard on radio" (Tr. 216).

Prospective juror Tribou stated that her prejudice against petitioner was based entirely upon television reports, newspaper reports, and the like (Tr. 241).

It is noteworthy that several of the panelists who admitted prejudice had undergone *less* exposure to the massive pre-trial publicity than several who were permitted to serve.

The issue raised by this series of events, springing from the McClellan committee hearings in march, May and October and ending in petitioner's conviction in December is whether it operated to deprive him unconstitutionally of his right to be tried by a jury of impartial persons. It is respect-

fully submitted that the answer to this question must be yes, and that the conviction must be vacated.

That due process as guaranteed by the Fourteenth Amendment requires trial by an impartial tribunal, or at the very least trial in an atmosphere where every reasonable effort has been made to guarantee impartiality, is now well established."

Mr. Justice Clark, speaking for a unanimous Court in the recent landmark case of *Irvin v. Dowd*, ... U. S. ....., 6 L. Ed (2d) 751 (1961) stated:

> "Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, . . . every state has constitutionally provided trial by jury. . . . In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."

The scope of the constitutional right to trial by

" "The sixth amendment guarantees that in all federal prosecutions the accused 'shall enjoy the right to . . . trial by an impartial jury . . .A question is raised whether and to what extent this guarantee is made applicable to state prosecutions by the due process clause of the fourteenth amendment. Even by minimal standards of due process an accused must be accorded a fair hearing, and if this requirement is to have any meaning it would seem the decision of the trier of fact must be substantially determined by what occurs at the hearing . . . thus even by the presently prevailing view that the due process clause requires only those procedures that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' the standard of the Fourteenth Amendment cannot be distinguished from that of the Sixth on the basis of an absence of a requirement of an impartial trier of fact in the Fourteenth." Note, *Community Hostility and the Right to an Impartial Jury*, 60 Columbia Law Review 349 (March 1960).

an impartial jury was significantly defined as follows by the Mississippi Court in *Seals v. State*, 44 So.(2d) 61 (Miss. 1950):

> "It means, in addition to the right to be tried by such [impartial] individual jurors, the right to be tried in an atmosphere in which public opinion is not saturated with bias and hatred and prejudice against the defendant; where jurors do not have to overcome that atmosphere, nor the later silent condemnation of their fellow citizens if they acquit the accused."

The case of *Irvin v. Dowd, supra,* was in many ways strikingly similar to the instant prosecution. There, the defendant was reported to have confessed to a number of murders committed in Indiana and neighboring Kentucky. Prior to his Indiana trial on a charge of committing one of the murders, the newspapers and other public media carried for a long period of time prominent accounts of his alleged confession, of his background and prior criminal history, of an alleged offer to plead guilty, and of various "curbstone" opinions about the case. During the impanelment 62% of the prospective jurors were excused for prejudice, and eight of the twelve who finally heard the case entertained some preconception of guilt, although all eight swore to disregard any such feeling and to decide the issues solely on the evidence presented in court. This Court vacated the conviction (while directing that the petitioner could be retained in custody pending a new indictment); the opinion cuts across the entire field of criminal due process as affected by publicity-engendered community prejudice, and should be quoted here at some length:

> "'The theory of the law is that a juror who has formed an opinion cannot be impartial.'

Reynolds v. United States, 98 U. S. 145, 155.

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [citations omitted].

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisioner's life or liberty without due process of law.' . . . as Chief Justice Hughes observed in *United States v. Wood*, 299, U. S. 123: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.'

"Here the buildup of prejudice is clear and convincing. Examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. . . .

"It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. . . .

"The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. See *Delaney v. United States*, 199 F.(2d) 107, 39 A.L.R. (2d) 1300. Where one's life is at stake—and accounting for the frailities of human nature—we can only say that under the light of the circumstances here the finding of impartiality does not meet constitutional standards. . . . No doubt each juror was sincere when he said that he would be fair and impartial to the petitioner, but the

psychological impact requiring such a declaration before one's fellows is often its father.... As one of the jurors put it, 'You can't forget what you hear and see.'"

Mr. Justice Frankfurter, concurring, stated:

"One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which has to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception."

The Court thus applied, in reversing a state conviction under the Fourteenth Amendment, the following rules for determining whether community prejudice has been such as to deprive an accused of his right to an impartial tribunal:

(1) Since it is virtually impossible for any defendant to present direct evidence that those who judged him were biased, the reviewing court must look to the surrounding events and circumstances to decide the issue. Accord: *People v. Williams*, 173 N. Y. Supp. 883 (1919); *People v. McLaughlin*, 44 N. E. 1017 (N.Y.); *State v. Dryman*, 269 P.(2d) 796, (Mont. 1954); Note, Controlling Press and

Radio Influence on Trials, 63 Harv. Law Rev. 840, 842.

(2) Even jurors who attempt to be conscientious are subject to subconscious or unacknowledged prejudice which may vitiate the defendant's right to a fair trial. Accord: *Shepherd v. Florida*, 341 U. S. 50 (1951) (concurring opinion)[15]; *People v. McKay*, 236 P.(2d) 145 (Cal. 1951)[16]; The opinions of Mr. Justice Frankfurter in *Pennekamp v. Florida*, 328 U. S. 331, and *Stroble v. California*, 343 U. S. 181.

(3) Although voir dire examination is the classical method for obtaining impartial jurors, the jurors' assertions of impartiality must be disregarded if the surrounding conditions render them probably inaccurate. Accord: *Juelich v. United States*, 214 F. (2d) 950 (5 Cir. 1954); *People v. Nathan*, 249 N. Y. Supp. 395 (1931); and compare

[15] The concurring opinion reads in part as follows:
"That prejudicial influences outside the court room, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated . . . . The case presents one of the best examples of one of the worst menaces to American justice."

[16] Reading in part, at p. 150: "However conscientious the members of the jury may have been, it cannot reasonably be concluded that they could so divorce themselves from their past experiences and present surroundings that a fair and impartial trial can be had."

Marshall v. United States, 360 U. S. 310 (1950), and *Janko v. United States*, 6 L. Ed. (2d) 846.[37]

If these principles are applied in the instant case, as they were in *Irvin*, the conclusion is inescapable that petitioner was forced to trial by jurors who had been ineradicably impressed with prejudice against him. The crimes laid to Irvin were surely more violent; but those laid to appellant by the McClellan Committee and the resultant campaign of public vilification were more wide-spread and shocking to the public, and were unquestionably the subject of more prolonged, intense and defamatory publicity. The so-called "minority" opinion of the court below (signed by four of the eight judges who participated) stated that (R. 867):

> "The amount, intensity and derogatory nature of the publicity received by [petitioner] during this period is without precedent in the state of Washington."

Further, virtually all of the adverse matter published about petitioner would have been inadmissible at his trial—i.e., it concerned alleged crimes other than (although generally of a type similar to) that with which he was charged. This again resembles the *Irvin* situation, where the defendant's

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[37] In the Janko case, a prejudicial newspaper article had appeared on the first day of the trial. Although there was no showing that any of the jurors had read it, the government confessed error in this Court in a memorandum which read in part as follows: "The nature of the newspaper article in question . . . was such as to raise substantial doubt whether if it did in fact reach the jurors the inadmissible prejudicial information could be wiped out of a juror's mind. *Marshall v. United States*, 360 U. S. 310. . . . Accordingly, since it is not clear that petitioner was found guilty by a jury uninfluenced by material plainly prejudicial on its face, we think it proper that the judgment of conviction should be reversed and that the cause be remanded for a new trial."

unrelated past criminal record was recounted. That the pre-trial publicity had taken its fatal effect was similarly shown in both cases by the high percentage of panelists who confessed prejudice and were excused, and by the complete inability of the defendants to find jurors who had not heard of the case, discussed the charges, and been exposed to the massive denunciatory publicity for weeks on end prior to the trial. Finally, it must be emphasised that the charges made and publicized against petitioner did not stem from the private enterprise of newspapers, nor even initially from the sheriff or prosecutor, but rather from an arm of the government having the highest prestige and authority: the United States Senate and its official representatives.

The latter element aligns this case with those in which courts have condemned the extra-judicial transmission to the public, by an agency of government of purported information and accusations concerning a prospective criminal defendant. Petitioner was not the victim solely of the relatively uncontrollable sensation-seeking of newspapers. Rather, his plight was directly and deliberately engendered by a Congressional investigating committee which summoned him as a witness after receiving advance notice that he would invoke his constitutional privilege against self-incrimination as to any question concerning his financial affairs; which thereafter, in three appearances extending over a period of months, forced him to invoke that privilege hundreds of times before a nationwide television audience; whose chairman, members and chief counsel systematically publicized "evidence" of his alleged misappropriations; and whose con-

tinued activity by the time of trial, had succeeded in transforming public opinion violently against him. The grave constitutional issues raised by such events were considered in *Delaney v. United States*, 199 F.(2d) 107 (1 Cir. 1952). The defendant there, a Revenue officer, was made the subject of an open congressional investigative hearing at a time when he was pending trial on charges involving misuse of office. Although Delaney did not appear as a witness at the hearings, substantial nationwide publicity was afforded the charges against him. On this basis he moved for a reasonable continuance to give the effects of the derogatory publicity a chance to abate, from the denial of which motion he subsequently appealed. The Court of Appeals vacated the conviction, stating:

> "Since the Committee evidently felt that there were overriding considerations of public interest which demanded that its open hearings proceed, it must be inferred that the Committee intended, as indeed it must have foreseen, that its proceedings would receive the most wide-spread publicity. . . .
>
> "It is fair to say that, so far as the modern mass media of communication could accomplish it, the character of Delaney was pretty thoroughly blackened and discredited as the day approached for his judicial trial on narrowly specified charges. . . .
>
> "We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States

must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed."

The atmosphere of prejudice against Delaney was held to be such that he was not required to exhaust his peremptory challenges; and the denial of a third continuance was held reversible even though two earlier substantial ones had been granted.

In *Delaney,* of course, the legislative and prosecuting body were both arms of the federal government. The practical result is the same, and the legal consequences should be the same, where one agency is a state arm and the other federal. In *United States v. Florio,* 13 F.R.D. 296 (S.D. N.Y. 1952), Judge Kaufman granted a change of venue based upon publicity stemming from the hearings of a state crime commission, and remarked at p. 298:

> "It is true that in Delaney both the investigation which stirred up the unfavorable publicity and the prosecution of the defendant were conducted by agencies of the federal government, as distinguished from the New York State Crime Commission and the federal prosecutor in this case. Clearly this is a difference without a distinction, for the result in both instances is the same."

Even if "exposure" were thought to be a valid function of a congressional committee, and even if the hundreds of questions put to petitioner regarding individual transactions were thought to be pertinent to the legislative inquiry, and their pertinency adequately made known to him (see *Watkins*

v. United States, 354 U. S. 178 (1957); *Barenblatt v. United States*, 360 U. S. 109 (1959)), still the line should be drawn at the point where the committee's denunciation permeates the public consciousness so thoroughly as to destroy the citizen's right to a fair trial on charges stemming directly from the committee's revelations and brought to court while the hearings are still in session. It is submitted that the government cannot be permitted to destroy a citizen both legislatively and judicially at the same time, or at stubstantially the same time, and that this must be true regardless of whether the prosecution stemming from the committee charges occurs in federal or state court. The result in either case is the loss to the individual of his fundamental right to fair treatment—not through the perhaps inevitable workings of mass communications or through any accidental fluctuation of public opinion, but rather through the conscious efforts of an arm of government which must necessarily have acted with full foreknowledge of the consequences.

The relief petitioner asked against the immense burden of the government's insistent, nine-month-long campaign against him, was either a short respite in time or a change of venue to some county where the public furor might have been less severe. As noted above, these motions were denied on the somewhat self-contradictory grounds that the veniremen of King County could act without prejudice and that there was no guarantee that a fairer trial could be had after the six-month interim requested. It is clear, however, that petitioner was entitled at least to the *chance* that the public hostility to him

would abate, and the State would have lost nothing by a continuance of that length.[38]

This record shows, as clearly as any record could, that the government-sponsored publicity, whatever it may have accomplished in the fields of politics or labor relations, served simultaneously to defeat petitioner's constitutional right to be judged by an impartial jury. Accordingly, his conviction should be vacated.

VII

CONCLUSION

In summary, the indictment, trial and appellate proceedings in this case all involved serious and substantial denials by the State of Washington of petitioner's right under the Fourteenth Amendment of the United States Constitution to due process

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[38] "Wide-spread dissemination through the mass media of information and opinions that create hostile sentiment toward a criminal defendant may render the usual procedural remedies totally ineffective to protect the defendant's rights to a dispassionate hearing. . . . Where the time required for community sentiment to fade is not very great, and no mode of procedural relief other than continuance will be effective, these [policy] considerations would not appear to justify relaxing the standards of impartiality, especially since delay of several months cannot often weaken the legitimate aspects of the prosecution's case . . . Since statements by public officials and publicity resulting from legislative investigations, may fall within the concept of governmental action, the due process clauses of the fifth and fourteenth amendments could effectively serve as an indirect control over these sources of hostility by precluding the state from urging its interest and trying a defendant wherever legislative investigations or statements by law enforcement officials have contributed to wide-spread hostility that cannot be avoided by means of traditional procedural remedies. Note, *Community Hostility and the Right to an Impartial Jury*, 60 Colum. Law. Rev. 349 (March 1960).

and equal protection of the law. The grand jury which accused him was convened in an atmosphere of the most extreme public passion and hostility arising directly from the deliberate acts of an agency of the federal government; the trial court and prosecutors at that stage, far from minimizing the necessarily prejudicial effects of such publicity, heightened and intensified its effect by focusing the attention of the grand jurors on the very extra-judicial accusations from which petitioner so desperately required protection; the prosecutors added their own weight and prestige to the public clamor against petitioner by their remarks and conduct during the grand jury proceedings, and at the trial. The state trial court made no effort to determine whether any of the grand jurors who returned the indictment were biased or prejudiced against petitioner by reason of the intensely hostile publicity to which he had been and continued to be subjected, nor were the grand jurors instructed to act solely upon the basis of the evidence presented to them rather than upon purported "public knowledge" and information released, to the saturation point, through the press and other news media. Petitioner was shortly thereafter forced to trial under circumstances which manifestly defeated his right to a panel of fair and impartial petit jurors; during the trial the prosecutors employed tactics which tended to influence the trial jury to give weight to the fact that the grand jury had indicted petitioner, and to imply that witnesses who had testified favorably to petitioner had either lied or sought refuge in the Fifth Amendment right against self-incrimination in their grand jury testimony; and on the appeal which followed, the State Supreme Court

purported to affirm petitioner's conviction at the cost of abandoning, for this case only, a clearly established system of appeal which should lawfully apply to all accused persons. As a result of this purported "affirmance", respondent now appears to contend in this Court that the law of the State of Washington concerning the right of a defendant to an impartial grand jury and to reasonable continuance or change of venue under the circumstances of this case has not been and cannot be judically determined, with the necessary result (respondent contends) that petitioner must be imprisoned while the state legislature decides the question. Petitioner submits that these are not mere questions of local law, but involve fundamental issues of due process and equal protection of the law of which this Court has always taken cognizance.

Petitioner did not and does not now seek immunity from prosecution by the State of Washington. What petitioner earnestly contends is that he was entitled, in the selection of the grand jury and conduct of its proceedings, to at least some minimum protection against bias and prejudice; and to trial before a petit jury at a time and place when and where it might reasonably be expected that the inflammatory and prejudicial statements concerning petitioner which had been widely and intensively disseminated in the press and through other news media should have subsided to the extent that prospective jurors would be relatively free of conscious and subconscious hostility, bias and prejuidce against him.

Aside from its obvious importance to petitioner, the tragedy of this case is that all of the errors of

which petitioner now complains could have been avoided without prejudice to respondent by the simple expedient of dismissing the indictment returned by the invalid grand jury, and proceeding by information (if the King County prosecutor believed in good faith as a reliable member of the bar that the evidence at his disposal warranted a prosecution), with a reasonable continuance and/or change of venue granted so that the trial might be conducted "in an atmosphere undisturbed by so huge a wave of public passion" as the record discloses in this case (Cf. *Irvin v. Dowd,* (1961) 6 L. Ed 2d 751, at 759.

To the suggestion by four of the judges of the Supreme Court of the State of Washington (who voted for affirmance of the conviction) that the number and novelty of the issues raised by petitioner in appellate proceedings is unjustified in this case because it is merely a "nineteen hundred dollar grand-larceny-by-embezzlement case" (R. 863), it should be pointed out not only that the sentence of fifteen years' imprisonment imposed upon petitioner (R. 27-28) involves a very serious deprivation of his liberty, but, more importantly, that the real victim, when such deprivation of liberty is permitted without true adherence to principles of justice and fairness, is the law itself.

When the prestige and power of the United States Senate is combined (whether deliberately or not) with the fearful omnipresence and persuasiveness of modern media and techniques of mass propaganda to discredit and denounce one who is about to be the subject of grand jury investigation and trial for a criminal offense directly or indirectly related to such extra-judicial accusations, the

courts are called upon to exercise greater vigilance than ever to insure "all the safeguards of a fair procedure."

To paraphrase the concurring opinion of Mr. Justice Frankfurter in *Irvin v. Dowd, supra,* (6 L.Ed. 2d 760):

> ". . . this is, unfortunately, not an isolated case that happened in [Seattle, Washington], nor an atypical miscarriage of justice due to anticipatory trial by newspaper instead of trial in court before a jury."

We submit that the vital issues of the right to a fair and impartial grand and petit jury presented to this Court today are not peculiar to petitioner's case, but represent one of the most serious problems in the sound administration of criminal justice in twentieth century America, because of the increasing frequency of sensational, publicly televised and reported legislative "investigating" committee hearings, accompanied by the ever-increasing influence of press, radio and television on the public attitudes—conscious and subconscious.

> "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction

so secured obviously constitutes a denial of due process of law in its most rudimentary conception." (Concurring opinion of Mr. Justice Frankfurter in *Irvin v. Dowd, supra,* 6 L.Ed. 2d 760).

As four of the judges of the Supreme Court of the State of Washington appraised the situation in petitioner's case (R. 867):

> "In view of the circumstances shown by the undisputed facts stated in the affidavits in this case, I think it would be unrealistic to believe that a very substantial number of the citizens of the community had not adopted, consciously or unconsciously, an attitude of bias and prejudice toward appellant at the time the grand jury was convened. *If ever there was a case which required the most stringent observance of every safeguard known to the law to protect a citizen against bias and prejudice, this was it.*" (Emphasis added)

Since the State of Washington not only did not apply the normal safeguards known to the law for minimizing the effect of bias and prejudice in petitioner's case, but in fact took affirmative steps to insure that the grand jury which accused him and the petit jury which tried him would perform their functions midst a maelstrom of publicity savagely hostile to and denunciatory of petitioner, we respectfully urge this Court to reverse the conviction with directions that the indictment herein be dismissed.

Respectfully submitted,
CHARLES S. BURDELL
JOHN J. KEOUGH

Of counsel:
FERGUSON & BURDELL
929 Logan Building
Seattle, Washington.

APPENDIX "A"

Capsule Summary of the Evidence Introduced at the Trial[1]

The trial in this case commenced on December 2, 1957. The State introduced evidence showing that a certain automobile owned by the Western Conference of Teamsters had been used from time to time by petitioner and other officers of the Teamsters Union (St. 438-443, 472); that in January 1956 the automobile was left at a Seattle garage for the purpose of being sold; that a certain Martin Duffy determined to purchase the car (St. 444-474); that Duffy assumed that the automobile belonged to petitioner, although no one told him so, and because of this assumption made his check for the purchase price ($1900.00) payable to petitioner (St. 488-490); that Duffy delivered the check to petitioner's secretary (St. 481); that petitioner's secretary made a telephone call to someone in the Teamster's building and that a bookkeeper then came to petitioner's office and delivered an envelope containing the certificate of title to petitioner's secretary, who in turn delivered the envelope to Duffy (St. 475-497); that the sale transaction in no way involved any negotiation between Duffy and petitioner and that petitioner was in fact out of the city at the time of the negotiations for the sale of the automobile and receipt of the funds (St. 488-490); that petitioner's secretary, without instructions from petitioner, deposited the check to the petitioner's personal ac-

[1] References to the Statement of Facts, which was transmitted to this Court in connection with the Petition for Writ of Certiorari, are indicated by the abbreviation "St." followed by the page number to which reference is made.

count because of the fact that it was made payable to petitioner (St. 1020).

One of the prosecutors who assisted in the conduct of the Grand Jury was called as a witness for the State. He testified that petitioner had appeared before the Grand Jury and had there testified that upon his return to Seattle and upon learning of the transaction he repaid the union (St. 639-640). This testimony was corrobated in the Grand Jury proceedings by a bookkeeper of the Teamsters Union whose testimony was made available to petitioner after the trial (R. 378-488). This witness was not called by petitioner at the trial because petitioner had been advised that he had been subjected to misconduct in the Grand Jury room and petitioner's counsel were uncertain as to the effect of such misconduct on the testimony of the witness; and in addition thereto, in the course of the trial of petitioner's son the prosecution had asserted in open court that this witness was evading service of a subpoena (which was never shown to be a fact) and that he, the prosecutor, would not vouch for the creditibility of the witness (R. 758-761). These charges by the prosecutor were reported prominently in the press (R.758-761, 768).

Petitioner introduced evidence showing that there was maintained at the Teamsters building a safe deposit box and that prior to the indictment of petitioner the box contained a large amount of currency (St. 590, 1064-1066). Petitioner also introduced evidence showing that petitioner frequently made contributions to political candidates in currency (St. 590, 592); and in the final agrument, petitioner's counsel argued that petitioner, upon returning to Seattle and learning of the mistaken de-

posit of funds to his account, had returned this sum in currency for the deposit in the safe deposit box and subsequent use for contributions to political campaigns. Petitioner testified in his own defense, but gave no testimony concerning receipt of the $1900 or the subsequent disposition thereof.*

The principal evidence relied upon by the State to prove the element of knowledge and intent consisted of the preliminary work sheets of a certified public accountant employed by petitioner to prepare his income tax returns. These work sheets contained an entry which showed a receipt of nineteen *thousand* dollars from a "Beck-Callahan" [Cadillac?] transaction. The identifying witness testified that the entry resulted from mis-reading the handwriting on the original ledger sheet (St. 674, 701, 753-754; Ex. 17, Ex. 18). It was definitely shown that these exhibits were not business records nor had the accountant discussed them with or shown them to petitioner or received any instructions whatsoever from petitioner concerning their preparation (St. 660-664, 667, 732, 734, 736, 964, 965, 1110). These documents were prepared by the accountant by reference to a receipt and disbursement ledger maintained by petitioner's secretary (St. 735, 753-754; Ex. 22). The latter document which the accountant identified as the instrument from which he compiled the work sheet, contained an entry correctly showing the $1,900.00 to have been a receipt relating to an automobile transaction. Petitioner had not seen the latter document and had given his secretary no instructions with reference

* If petitioner had contributed to a candidate for a national elective office he would have been guilty of a violation of 18 USC § 610.

to its preparation (St. 964-965, 1110). Neither preparation of these documents nor knowledge of their contents were in any way attributed to petitioner. The trial court, nevertheless, admitted Exhibits 17 and 18 in evidence and the state relied strongly on the erroneous entry, contending that it was proof of petitioner's knowledge and intent, even though the entries had been made by the accountant without the knowledge of petitioner (St. 701, 1317-1319). The theory upon which the State offered and the trial court admitted these documents was never clear (St. 1444). The Supreme Court of the State of Washington held that their admission did not constitute error, apparently upon the theory that it could be assumed that both the accountant and petitioner's secretary testified falsely, and that such testimony warranted the inference that affirmative authentication of the documents and petitioner's knowledge and responsibility therefor could be shown (R. 848-850). The opinion of the Supreme Court of the State of Washington on this point does not accurately summarize the testimony which was claimed to constitute the purported authentication of these documents (St. 660-666, 753, 754). Actually, all of the testimony negated any knowledge on the part of petitioner concerning the preparation of these documents.

The jury returned a verdict of conviction after a trial lasting approximately two weeks (St. 1-1347; (R. 27).